92-532

Supreme Court, U.S.
FILED
SEP 14 1992
OFFICE OF THE CLERK

NO. _____

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1992

STATE OF ARIZONA,

PETITIONER,

-VS-

JOSEPH BARTLETT, JR.,

RESPONDENT.

PETITION FOR WRIT OF CERTIORARI TO THE ARIZONA SUPREME COURT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Because federal and state courts conflict greatly in deciding how to analyze the frequently raised claim in noncapital cases that a sentence violates the Eighth Amendment, leading to erratic results and inconsistent application of the Constitution, should this Court clarify the holding and application of *Harmelin v. Michigan* and address the continued viability of *Solem v. Helm*?

2. Did the Arizona Supreme Court err as a matter of federal constitutional law in holding that *Harmelin* requires examination of the facts and circumstances underlying the offense and the offender, rather than only the threat posed to society by the type of conduct at issue, in evaluating whether a sentence is grossly disproportionate in violation of the Eighth Amendment?

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OPINIONS BELOW

In 1988, the Arizona Court of Appeals affirmed Joseph Bartlett Jr.'s (Bartlett's) mandatory sentences of 40 years without parole for two counts of sexual conduct with a minor under 15 years of age. *State v. Bartlett*, 2 CA-CR 88-0024, memo. dec. (Ariz. Ct. App., Nov. 10, 1988), attached as Appendix B.

The Arizona Supreme Court granted review and vacated Bartlett's sentences, applying *Solem v. Helm*, 463 U.S. 277 (1983), in finding them in violation of the Eighth Amendment. *State v. Bartlett*, [*Bartlett I*], 792 P.2d 692 (Ariz. 1990), attached as Appendix C. The court denied the State's motion for reconsideration. (Order, dated June 19, 1990, Appendix D.)

This Court accepted the State's petition for writ of certiorari, vacated *Bartlett I*, and remanded the case to the Arizona Supreme Court for further consideration in light of *Harmelin v. Michigan*, ___ U.S. ___, 111 S. Ct. 2680 (1991). *Arizona v. Bartlett*, ___ U.S.___, 111 S. Ct. 2880 (1991), attached as Appendix E.

On remand, the Arizona Supreme Court again found Bartlett's sentences in violation of the Eighth Amendment. *State v. Bartlett*, [*Bartlett II*], 830 P.2d 823 (Ariz. 1992), attached as Appendix A. The court denied the State's motion for reconsideration. (Order, dated June 17, 1992, Appendix F.)

STATEMENT OF JURISDICTION

The State of Arizona seeks review of the Arizona Supreme Court's decision in *Bartlett II*, filed on May 8, 1992. (Appendix A.) The State filed a timely motion for reconsideration on May 14, 1992, which the Arizona Supreme Court denied by order dated June 17, 1992. (Appendix F.) This present petition for writ of certiorari was filed on September 14, 1992, within 90 days of the Arizona Supreme Court's order denying the State's motion for reconsideration.

This Court has jurisdiction to review the opinion of the Arizona Supreme Court pursuant to 28 U.S.C. § 1257.

CONSTITUTIONAL PROVISIONS INVOLVED

The pertinent part of the Eighth Amendment to the United States Constitution provides:

> [N]or cruel and unusual punishment inflicted.

The pertinent part of the Fourteenth Amendment to the United States Constitution provides:

> [N]o state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law . . . .

STATUTORY PROVISIONS INVOLVED

In 1986, at the time of Bartlett's offenses,[1] the sexual conduct with a minor statute, A.R.S. § 13-1405, provided:

> A. A person commits sexual conduct with a minor by intentionally or knowingly engaging in sexual intercourse or oral sexual contact with any person who is under eighteen years of age.
>
> B. Sexual conduct with a minor under fifteen years of age is a class 2 felony *and is punishable pursuant to § 13-604.01*. Sexual conduct with a minor fifteen years of age or over is a class 6 felony.

(Emphasis added.)

The dangerous crimes against children statute, A.R.S. § 13-604.01, is attached to this petition as Appendix G.

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1. In 1990, the legislature amended this statute, lowering to 14 the age at which sexual conduct with a minor becomes a class 2 felony subject to the provisions of A.R.S. § 13-604.01.

STATEMENT OF THE CASE

During the fall of 1986, Bartlett, a 23 year old man, engaged in sexual intercourse with two ninth grade girls whom he had met during his daily sojourns at a fast food restaurant across from a high school. Bartlett knew both girls were only 14 years old.

On January 23, 1987, the Cochise County Grand Jury indicted Bartlett on three counts of sexual conduct with a minor involving the two 14-year-old girls and a third girl, who was 15 years old. The State of Arizona moved to invoke the repeat offender enhanced punishment provisions of A.R.S. § 13-604(H).

The jurors returned verdicts of guilty on the two counts of sexual conduct with a minor involving the 14-year-old girls, and not guilty on the third count involving the 15-year-old girl. The trial court entered judgments of guilt and imposed the minimum mandatory sentence—15 years for the first count and 25 years for the second, to be served consecutively and with no possibility of early release.[2]

Bartlett appealed to the Arizona Court of Appeals, arguing that the long mandatory sentences imposed on him were cruel and unusual and violated the Eighth Amendment. (Appendix B at 2-3.) The Arizona Court of Appeals rejected Bartlett's arguments and

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2. Each offense was a class 2 felony and dangerous crime against children pursuant to A.R.S. §§ 13-1405 and 13-604.01. For the first offense, the statutes provided a mandatory sentencing range of between 15 and 25 years. A.R.S. § 13-604.01(A), (D). The first offense served as a "predicate felony" and enhanced the sentencing range for the second offense to between 25 and 35 years. A.R.S. § 13-604.01(A), (D), (K)(2). The statutes required that the sentences be served consecutively, with no possibility of early release. A.R.S. § 13-604.01(E), (J).

affirmed the sentences. (*Id.*)

The Arizona Supreme Court accepted Bartlett's petition for review to consider "the constitutional issue whether defendant's sentences are unconstitutionally cruel and unusual under the particular facts of this case." (*Bartlett I*, Appendix C at 14.) Engaging in an extended analysis of the facts of this case and other sentences imposed in Arizona and across the nation, the Arizona Supreme Court concluded:

> [W]e hold that the sentences imposed are disproportionate to defendant's crimes under the analysis required by *Solem v. Helm*, and thus were unconstitutionally imposed.

(*Bartlett I*, citations omitted, Appendix C at 3.) The Arizona Supreme Court did not address whether Bartlett's sentences violated the Arizona Constitution. (*Bartlett I*, Appendix C at 55.)

Acknowledging that Bartlett received the minimum sentence allowed by law and noting that there was no more lenient sentence to which Bartlett could be sentenced under the provisions of A.R.S. § 13-604.01, the Arizona Supreme Court nevertheless severed the concededly constitutional provision requiring mandatory sentencing from the substantive provisions of A.R.S. § 13-1405 and remanded the case for resentencing without the enhanced penalties required by the legislature for dangerous crimes committed against children, classifying Bartlett as a class 2 felon. (*Bartlett I*, Appendix C at 58-61.)

Pursuant to the Arizona Supreme Court's order of remand, the trial court resentenced Bartlett while a petition for writ of certiorari was pending on *Bartlett I*. Bartlett, now designated a class 2 felon,

received concurrent terms of 5-1/4 years on the first count and 7 years on the second count. (*Bartlett II*, Appendix A at 4–5.) Because the Arizona Supreme Court had struck the dangerous crimes against children designation of the offenses, Bartlett would have become eligible for parole in 4 years and 8 months, and would have served no more than 7 years. (*Id.* at 5.)

This Court soon invalidated Bartlett's new sentences by granting the State's petition for writ of certiorari, vacating the Arizona Supreme Court's judgment, and remanding the matter to the Arizona Supreme Court for consideration in light of *Harmelin v. Michigan*. (*Arizona v. Bartlett*, Appendix D.)

On remand, the Arizona Supreme Court again vacated Bartlett's original 40-year sentence as violative of the Eighth Amendment. (*Bartlett II*, Appendix A at 28.) The majority then reinstated the 5-1/4-year and 7-year concurrent sentences imposed by the trial court during the pendency of the petition for writ of certiorari on *Bartlett I*. (*Id.* at 28–29.) The author of *Bartlett I* and another justice dissented, concluding that the majority simply reapplied *Solem* rather than following this Court's order to reconsider Bartlett's sentences in light of *Harmelin*. (*Id.* at 30, 52.)

ARGUMENTS

I

THIS COURT SHOULD REVISIT HARMELIN TO PROVIDE CLEAR GUIDANCE TO THE LOWER COURTS, WHICH CONFLICT REGARDING WHAT ANALYSIS TO APPLY IN EVALUATING NONCAPITAL DEFENDANT'S OFT RAISED CHALLENGES TO THE CONSTITUTIONALITY OF THEIR SENTENCES OF IMPRISONMENT.

A. FEDERAL AND STATE COURTS ARE INUNDATED WITH NONCAPITAL CASES CHALLENGING THE CONSTITUTIONALITY OF THE TERMS OF IMPRISONMENT IMPOSED.

Dissenting in *Solem v. Helm*, Chief Justice Burger expressed his fear that the case would "flood the appellate courts with cases in which equally arbitrary lines must be drawn," and "'administer the *coup de grace* to the courts of appeals as we know them.'" *Solem v. Helm*, 436 U.S. at 315 (Burger, C.J., dissenting) (quoting H. FRIENDLY, FEDERAL JURISDICTION: A GENERAL VIEW 36 (1973)). These fears have been borne out.

In the period between *Rummel v. Estelle*, 445 U.S. 263 (1980), and *Solem v. Helm*, an average of 50 cases a year were reported citing *Rummel* and either the Eighth Amendment or the phrase "cruel and unusual." After *Solem*, the number of cases almost doubled—an average of 95 cases per year were reported citing *Solem* and the Eighth Amendment or the phrase "cruel and unusual." It is unknown how many hundreds of cases addressing the issue were disposed of in unpublished decisions.

Harmelin has done absolutely nothing to dam the river released by *Solem*. In the short time since this Court's pronounce-

ment of *Harmelin*, 120 reported decisions have cited *Harmelin* and referred to the Eighth Amendment or the phrase "cruel and unusual." This is a pace of approximately 100 reported cases per year.

Defendants in noncapital cases are consistently and frequently challenging their sentences of imprisonment. Thus, the courts are regularly faced with the quandry of trying to determine and apply the proper analysis to evaluate these challenges, in light of the confusion that has followed *Harmelin*.

B. COURTS ARE UNSURE OF THE CONTINUED VIABILITY OF THE ANALYSIS SET FORTH IN SOLEM.

One of the factors contributing to the flood of Eighth Amendment litigation is the uncertainty regarding the effect *Harmelin* had on the analysis previously set forth by this Court in *Solem*. This uncertainty is evidenced by the statements made by both federal circuit and state supreme courts across the country regarding the relationship between *Solem* and *Harmelin*. *See, e.g.*, *United States v. Johnson*, 944 F.2d 396, 408 (8th Cir.), *cert. denied*, 112 S. Ct. 646 (1991) ("The effect of *Harmelin* on the *Solem* proportionality factors is not entirely clear."); *People v. Gaskins*, 825 P.2d 30, 34 n.10 (Colo.), *cert. denied*, No. _____ (June 22, 1992) ("The United States Supreme Court's recent decision in *Harmelin* . . . leaves the future of *Solem* somewhat clouded."); *People v. Bullock*, 485 N.W.2d 866, 873 (Mich. 1992) ("It is unclear, in the wake of *Harmelin*, whether . . . *Solem's* analysis survives as a matter of federal constitutional law."); *State v. Borrell*, 482 N.W.2d 883, 893 (Wis. 1992) (*Harmelin* "casts

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serious doubt on the viability of the proportionality analysis [of *Solem*] in non-death penalty cases.").

The widespread questions regarding the effect of *Harmelin* on *Solem* has spawned direct conflicts in the courts. In the federal system, some courts continue to apply the three-prong analysis set forth in *Solem*. *See, e.g.*, *United States v. 38 Whalers Cove Drive*, 954 F.2d 29, 38-39 (2d Cir.), *petition for cert. filed*, No. 91-1682 (Apr. 20, 1992) (listing and applying *Solem* three-prong analysis in determining if sentence grossly disproportionate); *Tart v. Massachusetts*, 949 F.2d 490, 503-04 (1st Cir. 1991) (finding that *Solem* remains "controlling precedent," and relegating *Harmelin* to a footnote); *United States v. Contreras*, 937 F.2d 1191, 1195-96 (7th Cir. 1991) ("The eighth amendment proportionality guaranty explicated in *Solem* remains viable."); *United States v. Manuel*, 944 F.2d 414, 417 (8th Cir. 1991) (finding *Solem's* holding is still controlling).

In contrast, some federal courts apply *Solem* only in limited circumstances or in a limited form. *See, e.g.*, *McGruder v. Puckett*, 954 F.2d 313, 315-16 (5th Cir.), *petition for cert. filed*, No. 91-8571 (May 22, 1992) (*Solem's* three-part analysis is available as a tool to be used only in the rare cases where a comparison of the crime committed and the sentence imposed leads to an inference of gross disproportionality); *McCullough v. Singletary*, 967 F.3d 530, 535 (11th Cir. 1992) (declining to apply "other" *Solem* factors after determining sentence not grossly disproportionate); *United States v. Johnson*, 944 F.2d at 408-09 (*Harmelin* "substantially refined the application of the *Solem* factors.").

Still other federal courts make little mention of *Solem*. *See, e.g.*, *United States v. Hopper*, 941 F.2d 419, 422 (6th Cir. 1991) (applying the "narrow proportionality principle" set forth by Justice Kennedy in *Harmelin*); *United States v. McLean*, 951 F.2d 1300, 1302 (D.C. Cir. 1991), *cert. denied*, 112 S. Ct. 1775 (1992) (citing *Rummel* and Kennedy's concurrence in *Harmelin*). One Seventh Circuit court avoided the issue entirely by imposing its own creative analysis. *United States v. Vasquez*, 966 F.2d 254, 261 (7th Cir. 1992) (declining to engage in a *Solem* type analysis, reasoning that a sentence within legislatively prescribed limits will only be disproportionate if the sentencing judge has abused his discretion).

Conflicts exist internally within single circuits as well as between different circuits. For example, one Fifth Circuit decision states that *Solem* must be viewed in light of *Harmelin* and used only in rare cases when there has been a threshold showing of gross disproportionality. *McGruder v. Puckett*, 954 F.2d at 315-16. Another simply states that *Solem* was "replaced" by *Harmelin*. *Bradford v. Whitley*, 953 F.2d 1008, 1012 (5th Cir.), *petition for cert. filed*, No. 91-2035 (June 22, 1992). In contrast, two other decisions in the circuit apply the three-prong analysis set forth in *Solem*, with little discussion of *Harmelin*. *United States v. O'Banion*, 943 F.2d 1422, 1432-33 (5th Cir. 1991); *United States v. Lemons*, 941 F.2d 309, 320 (5th Cir. 1991).

State supreme courts are similarly in conflict with the federal courts and each other. Both Arizona and Wisconsin purport to apply the threshold comparison test set forth by Justice Kennedy

in *Harmelin*. (*Bartlett II*, Appendix A at 11); *State v. Borrell*, 482 N.W.2d at 893-94. Colorado adheres to the three-prong analysis set forth in *Solem* "[i]n the absence of more definitive guidance from the United States Supreme Court." *People v. Gaskins*, 825 P.2d at 33-34 and n.10. The Georgia Supreme Court has relied on *Harmelin* and *Rummel* rather than addressing *Solem*. *State v. Isom*, 408 S.E.2d 701, 702-03 (Ga. 1991).

Many courts, unwilling to enter the churning waters before them, engage in little analysis, cursorily concluding that, if Harmelin's sentence was constitutional, so is the one received by the defendant before them. *See, e.g., United States v. Jones*, 965 F.2d 1507, 1518 (8th Cir. 1992); *United States v. Gordon*, 953 F.2d 106, 107 (8th Cir.), *petition for cert. filed*, No. 91-8726 (June 19, 1992); *United States v. Abreu*, 962 F.2d 1425, 1429 (10th Cir. 1992); *United States v. Harvey*, 946 F.2d 1375, 1378 (8th Cir. 1991); *United States v. Salmon*, 944 F.2d 1106, 1130-31 (3d Cir. 1991), *cert. denied*, 112 S. Ct. 1213 (1992); *United States v. Torres*, 941 F.2d 124, 127 (2d Cir. 1991); *United States v. Van Winrow*, 951 F.2d 1069, 1071 (9th Cir. 1991).

C. THOSE COURTS APPLYING HARMELIN'S THRESHOLD COMPARISON CONFLICT REGARDING WHETHER THE SPECIFIC FACTS AND CIRCUMSTANCES OF THE CRIME MUST BE EXAMINED.

Of those courts purporting to apply *Harmelin*, another conflict exists over whether the court should examine the particular facts and circumstances surrounding the offense and the offender, or should instead examine only the threat posed to society and to the individual by the type of conduct at issue, when comparing the

crime committed and the sentence imposed to make the threshold determination of whether there exists an inference of gross disproportionality.

Several courts have found *Harmelin* to require only an examination of the threat posed by the type of conduct at issue, and not the specific facts underlying the defendant's offense. As summarized in one Sixth Circuit case, "Justice Kennedy analyzed the seriousness of the offense generically in terms of the threat posed by the type of conduct at issue in the case rather than the specific threat posed by Mr. Harmelin himself." *United States v. Hopper*, 941 F.2d at 422 (examining threat posed by the defendant's type of offense); *see also McCullough v. Singletary*, 967 F.2d at 535 (examining type of conduct generally involved in the offenses committed by the defendant); *McGruder v. Puckett*, 954 F.2d at 316–17 (evaluating the types of prior crimes defendant committed and the threat to society from them, and not the specific facts of the defendant's prior crimes). This approach is adopted by the dissent in the current case, which stated:

> *Harmelin* provides no support for the majority's discussion of the indispensability of considering the facts of defendant's crimes or for its consideration of those facts in determining whether defendant's sentences are grossly disproportionate to the severity of his crimes.

Bartlett II (Corcoran, J., dissenting), Appendix A at 34.

In conflict with this approach, other courts have examined the specific circumstances underlying the defendant's commission of the charged offense in determining gross disproportionality. *See, e.g., Bradford v. Whitley*, 953 F.2d at 1012 (looking at underlying facts of defendant's armed robbery and attempted manslaughter

convictions); *United States v. Pavlico*, 961 F.2d 440, 448 (4th Cir.), *petition for cert. filed*, No. 91-8558 (June 9, 1992) (examining specifics of the crime and comparing defendant's culpability with that of his co-defendants). This approach is taken by the majority of the Arizona Supreme Court in the present case:

> [W]e read Justice Kennedy's opinion to mean that it is the circumstances of the crime and the criminal that must be considered in determining gross disproportion.

Bartlett II, Appendix A at 75-76.

D. THE COUNTRY NEEDS THIS COURT'S GUIDANCE TO RESOLVE THESE CONFLICTS.

The above brief examination of the diverse analyses being applied by courts across the nation leads to the inescapable conclusion that this Court must quickly step forward and address this issue. Without immediate intervention, courts will continue to divide into an increasing number of analytical camps and defendants will be faced with an unequal application of constitutional justice.

II

THE ARIZONA SUPREME COURT ERRED AS A MATTER OF FEDERAL CONSTITUTIONAL LAW IN INTERPRETING HARMELIN TO REQUIRE EXAMINATION OF THE SPECIFIC FACTS AND CIRCUMSTANCES UNDERLYING BARTLETT'S CRIME IN DETERMINING IF THEY WERE GROSSLY DISPROPORTIONATE TO THE SENTENCES IMPOSED.

In *Bartlett I*, the Arizona Supreme Court applied the three-prong test set forth in *Solem*. (*Bartlett I*, Appendix C at 20.) To determine the "gravity of the offense" under the first prong of *Solem*, the Arizona Supreme Court examined

> the type of harm threatened or inflicted and the level of the defendant's culpability, measured by the seriousness of the crime, against whom it was committed, and its level of violence.

Id. (citing *Solem*, 463 U.S. at 292-93). Thus, the Arizona Supreme Court evaluated the specific circumstances underlying Bartlett's particular offenses.

In *Bartlett II*, on remand from this Court for consideration in light of *Harmelin*, the Arizona Supreme Court held that, under Justice Kennedy's concurrence in *Harmelin*, a threshold comparison must be made between the crime committed and the sentence imposed in order to determine if there is an inference of gross disproportionality. (*Bartlett II*, Appendix A at 9-11.) The court held, however, that this comparison could not be made "without considering all of the factors that aggravate or mitigate the crime," reasoning that Justice Kennedy meant "that it is the circumstances of the crime and the criminal that must be

considered in determining gross disproportion." (*Id.* at 17, 75.) Based upon this analysis of *Harmelin*, the *Bartlett II* majority resorted to the very factors listed as relevant under the first prong of *Solem* and its previous analysis of those factors in *Bartlett I* to make the *Harmelin* threshold determination. (*Bartlett II*, Appendix A at 13–21.)

Not surprisingly, in *Bartlett II* the court reached the same result applying the factors set forth in *Solem* as it had reached applying them in *Bartlett I*. It then applied *Solem's* intra and inter-jurisidictional analysis, just as it had done in *Bartlett I*. (*Id.* at 25–27, 54–71.) The court concluded by again vacating Bartlett's 40-year sentence for two counts of sexual conduct with a minor under the age of 15, and reinstating the sentences which had been imposed by the trial court during the pendency of the petition for writ of certiorari in *Bartlett I*. (*Id.* at 28–29.)

A review of the court's analysis shows that the *Bartlett II* majority read this Court's remand of *Bartlett I* for consideration in light of *Harmelin* to be little more than an invitation to reapply *Solem*. An examination of the gross disproportionality analysis conducted by Justice Kennedy, however, shows that the proper analysis requires a comparison of the type of conduct at issue, not the specifics of the defendant's crime and character. As stated by the dissent in *Bartlett II*:

> Justice Kennedy's analysis measured the severity of Harmelin's crime *not* by analyzing the *particular facts and circumstances* of the crime, but rather by analyzing the *threat posed to the individual and to society* by the commission of that crime. *See Harmelin*, . . . 111 S. Ct. at 2705–07 (In determining whether Harmelin's crime

> was momentous enough to warrant a life sentence without parole, Justice Kennedy did not discuss the fact that during the commission of his crime Harmelin was neither violent nor did he injure anyone. Rather, Justice Kennedy discussed numerous ways in which illegal drugs threaten the individual and society).

Bartlett II (Corcoran, J., dissenting) (emphasis in original), Appendix A at 32–33.

Requiring examination of the facts and circumstances aggravating or mitigating a defendant's crime contradicts not only the analysis applied by Justice Kennedy, but also this Court's rejection of Harmelin's argument that he was constitutionally entitled to individualized sentencing. *Harmelin*, 111 S. Ct. at 2701–02. As the *Bartlett II* dissent noted, "the eighth amendment allows a judge to impose a sentence *without* taking into account the particulars of the crime or of the criminal." (*Bartlett II*, (Corcoran, J., dissenting) (citing *Harmelin*, 111 S. Ct. at 2684, 2701–02, 2707–09), Appendix A at 33–34.)

As indicated above, the *Bartlett II* majority found that "the question of 'gross disproportion' cannot be resolved without considering all of the factors that aggravate or mitigate the crime," i.e., "the circumstances of the crime and the criminal." (*Bartlett II*, Appendix A at 17, 75.) Under this analysis, a noncapital defendant, who *is not* constitutionally entitled to have his individual circumstances considered in sentencing, *is* constitutionally entitled to a determination of whether his sentence is constitutional given his individual circumstances. This result is internally inconsistent and an erroneous application of *Harmelin*.

CONCLUSION

Large numbers of noncapital defendants continue to challenge the constitutionality of the terms of imprisonment imposed upon them. Courts across the nation, faced with this inundation of claims, have been unable to consistently adjudicate them. The 3-2 decision in the present case represents but one example of the conflicts plaguing the courts and the erratic results that have followed. Given the desperate need of the courts below for guidance on this issue, and the Arizona Supreme Court's erroneous application of *Harmelin*, Petitioner urges this Court to accept review, to overrule the Arizona Supreme Court's determination that Bartlett's sentences were unconstitutional, and to modify or clarify *Harmelin* to provide future guidance.

Respectfully submitted,

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APPENDIX A

[Filed May 8, 1992]

IN THE SUPREME COURT OF THE STATE OF ARIZONA

THE STATE OF ARIZONA,	)	Supreme Court
	)	No. CR-88-0411-PR
Appellee,	)	
	)	Court of Appeals
vs.	)	No. 2 CA-CR 88-0024
	)	
JOSEPH BARTLETT, JR.,	)	Cochise County
	)	No. CR 87-00020
Appellant.	)	
_____	)	O P I N I O N

Appeal from the Superior Court of
Cochise County

The Honorable Richard A. Winkler, Judge

ORIGINAL SENTENCE VACATED
SENTENCE AFTER REMAND AFFIRMED

Memorandum Decision of the Court of Appeals,
Division Two, filed November 10, 1988,
vacated

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FELDMAN, Chief Justice

In State v. Bartlett, 164 Ariz. 229, 240, 792 P.2d 692, 703 (1990) (hereinafter Bartlett I), we held that Joseph Bartlett, Jr.'s forty-year sentence constituted cruel and unusual punishment under the eighth amendment to the United States Constitution. The case is back before this court because the United States Supreme Court vacated our opinion and remanded for further consideration in light of its decision in Harmelin v.Michigan, ___ U.S. ___, 111 S.Ct. 2680 (1991). See Arizona v. Bartlett, ___ U.S. ___, 111 S.Ct. 2880 (1991).

FACTS AND PROCEDURAL HISTORY

Joseph Bartlett, Jr. (Defendant) was convicted in 1987 of two counts of sexual misconduct with a minor, under A.R.S. § 13-1405. The facts established that the two girls involved were just under

fifteen years old and that the sexual acts were entirely consensual. Nevertheless, the state invoked the provisions of A.R.S. §§ 13-604(H) and 13-604.01, requiring the trial court to impose mandatory consecutive sentences on the two counts. As a result, even though he imposed the mitigated minimum terms of fifteen and twenty-five years, the trial judge was required to sentence Defendant to consecutive terms totaling forty years in prison, the sentence to be served as "hard time," with no possibility of early release or parole.

Acknowledging that A.R.S. § 13-604.01 was constitutional on its face, Defendant challenged the constitutionality of his sentence and claimed that, with regard to his crime, the sentence constituted cruel and unusual punishment. The court of appeals rejected this argument and affirmed Defendant's sentence in a memorandum decision. State v. Bartlett,

No. 2 CA-CR 88-0024 (Ct. App. Nov. 10, 1988). On review, we concluded that Defendant's sentence constituted cruel and unusual punishment under the eighth amendment to the United States Constitution. Bartlett I, 164 Ariz. at 240, 792 P.2d at 703. Noting that Defendant could not be given a more lenient sentence under the provisions of A.R.S. § 13-604.01, we remanded the case for resentencing, classifying Defendant as a class 2 felon but holding that "the statutory range of sentencing under A.R.S. § 13-604.01 [could not] constitutionally be applied" on resentencing. Id. at 241-42, 792 P.2d at 704-05.

The United States Supreme Court granted the state's petition for a writ of certiorari, vacated our opinion, and remanded for reconsideration in light of its decision in Harmelin. While Arizona v Bartlett was pending before the United States Supreme Court, Defendant appeared

before the trial judge for resentencing pursuant to our order of remand. No longer constrained by A.R.S. §§ 13-604(H) and 13-604.01, the trial judge was vested with considerably more discretion in sentencing defendant on his two-count conviction. After hearing evidence regarding the offenses, and in the exercise of his discretion, the judge imposed the minimum terms for a class 2 felony, sentencing Defendant to five and one-quarter years on one count and seven years on the other, the sentences to run concurrently. The trial judge could have, but did not, sentence Defendant to aggravated terms that, if imposed consecutively, would have totalled thirty-five years. Under the sentence imposed, Defendant would have become parole-eligible in approximately four years and eight months and could have served no more than seven years. Thus Defendant, who has been incarcerated in

the state prison system since his sentencing in 1988, would soon be eligible for parole if not for the United States Supreme Court's remand for reconsideration.

On remand from the United States Supreme Court, we requested additional briefing from counsel and heard additional oral argument on the question of whether our holding in Bartlett I could stand in light of the Supreme Court's decision in Harmelin. Accordingly, we begin with a summary of our previous opinion and an analysis of the Supreme Court Justices' opinions in Harmelin.

DISCUSSION

A. Bartlett I

We granted review in Bartlett I to determine whether Defendant's sentence constituted cruel and unusual punishment under the federal or state constitution.

164 Ariz. at 230, 792 P.2d at 693. Applying the three-prong test of Solem v. Helm, 463 U.S. 277, 103 S.Ct. 3001 (1983), we held:

1. The forty-year sentence with no possibility of early release was grossly out of proportion to the severity of the crimes as shown by the facts of the case. Bartlett I, 164 Ariz. at 234-36, 792 P.2d at 697-99.

2. The sentence was disproportionate to others imposed in Arizona for more serious crimes. Id. at 236-37, 792 P.2d at 699-700.

3. The sentence was disproportionate to those imposed on similarly situated defendants in other jurisdictions. Id. at 237-40, 792 P.2d at 700-03.

We therefore concluded that Defendant's sentence constituted cruel and unusual punishment under the eighth amendment to the United States Constitution, and consequently did not address the validity

of the sentence under the analogous provision in the Arizona Constitution. Id. at 240-41, 792 P.2d at 703-04.

B. Harmelin v. Michigan

Ronald Harmelin was sentenced in state court to a mandatory term of life imprisonment without possibility of parole after being convicted of possessing 672 grams of cocaine. On appeal to the United States Supreme Court, Harmelin claimed his sentence was unconstitutionally cruel and unusual because it was "significantly disproportionate" to his crime, and because the judge was required by statute to impose a fixed sentence without considering the "particularized circumstances of the crime and of the criminal." Harmelin, ___ U.S. at ___, 111 S.Ct. at 2684.

Justice Scalia announced the Court's judgment that Harmelin's sentence did not

constitute cruel and unusual punishment. Justice Scalia delivered the Court's opinion, however, only in rejecting Harmelin's contention -- which Bartlett does not raise in the present case -- that "a sentence which is not otherwise cruel and unusual becomes so simply because it is 'mandatory'" and that individualized sentencing is required in noncapital cases. Id. at ___, 111 S.Ct. at 2701-02. In contrast, only Chief Justice Rehnquist concurred with Justice Scalia's conclusion that "Solem was simply wrong; the Eighth Amendment contains no proportionality guarantee," id. at ___, 111 S.Ct. at 2686, which was not the holding of the Court.

Justice Kennedy, joined by Justices O'Connor and Souter, delivered a concurring opinion on the question of proportionality, the issue now before us. Justice Kennedy stated that the eighth amendment "encompasses a narrow

proportionality principle." Id. at ___, 111 S.Ct. at 2702. He interpreted Solem as "best understood as holding that comparative analysis within and between jurisdictions is not always relevant to proportionality review." Id. at ___, 111 S.Ct. at 2707 (emphasis added). "[I]ntra- and inter-jurisdictional analyses are appropriate only in the rare case in which a threshold comparison of the crime committed and the sentence imposed leads to an inference of gross disproportionality." Id. The important test, therefore, is whether the sentence is grossly disproportionate to the gravity of the offense. The purpose of comparative analysis is to validate an initial inference of gross disproportionality. Id.

Finally, four members of the Court (Justices White, Blackmun, Stevens, and Marshall) would not restrict Solem at all. Id. at ___, 111 S.Ct. at 2709-19

(White, J., dissenting); id. at ___, 111 S.Ct. at 2719 (Marshall, J., dissenting; id. at ___, 111 S.Ct. at 2719-20 (Stevens, J., dissenting).

Applying the view of the Court is difficult when the Justices' opinions are so diverse and expressed in five separate opinions. We believe, however, that Solem survives Harmelin. While two Justices conclude that it was wrong, neither a majority nor a plurality was willing to overrule Solem.[1] On the other hand, it seems reasonable to conclude that if Solem's proportionality analysis is to be applied at all, Justices Scalia and Rehnquist would probably prefer Justice Kennedy's approach over the dissenters' strict adherence to Solem's three-prong analysis.[2] We therefore reexamine our opinion in Bartlett I under the standard articulated by Justice Kennedy.[3]

C. Application of the Harmelin Standard

1. Gross Disproportion of Defendant's Sentence to his Crimes

We begin our inquiry under Harmelin by following Justice Kennedy's direction to determine whether Defendant's forty-year total sentence with no possibility of parole is grossly disproportionate to his crimes. In Bartlett I, we held that the "broad application of the statute to encompass [Defendant's] situation results in a penalty grossly out of proportion to the severity of the crime." 164 Ariz. at 236, 792 P.2d at 699 (emphasis added). We reached this conclusion after thorough analysis of the facts, which may be summarized as follows: In September 1986, Defendant, age twenty-three, was introduced to Mary,[4] age fourteen and one-half. A few months later, Mary introduced Defendant to her friend Susan, of approximately the same age. Mary had

voluntary sexual intercourse with Defendant in December 1986, when she was fourteen years and ten months of age. Susan also had voluntary sexual intercourse with Defendant in December 1986, when she was fourteen years and six months of age.

In January 1987, Susan's mother filed a complaint with the police, alleging that Defendant had forcibly sexually assaulted Susan. When Defendant learned from neighbors that the police were inquiring about him, he voluntarily went to the police station. Defendant admitted to the police that he had had consensual sexual intercourse with both Susan and Mary knowing that they were under fifteen years old at the time. Both girls testified at trial that the intercourse with Defendant had been voluntary. Defendant was found guilty of two counts of sexual conduct with a minor under fifteen years old. See A.R.S. § 13-1405.[5]

There are no new facts to be considered in our current analysis. In general, then, this is a case of consensual sexual relations. On the other hand, we bear in mind that the two victims were below the age determined by the legislature to be the age at which consent to sexual relations could validly be given. This means, of course, that Defendant's conduct was criminal, but does not foreclose the constitutional issue: whether a forty-year sentence without possibility of parole is cruel and unusual when applied to the facts set forth above.

In Solem, the Supreme Court set forth several factors relevant in weighing the gravity of an offense against the severity of a penalty in order to determine gross disproportion. These include "the harm caused or threatened to the victim or society, and the culpability of the offender. . . . For example, as the

criminal laws make clear, nonviolent crimes are less serious than crimes marked by violence or the threat of violence." 463 U.S. at 292-93, 103 S.Ct. at 3011. The Court explained that

> [t]his list is by no means exhaustive. It simply illustrates that there are generally accepted criteria for comparing the severity of different crimes on a broad scale, despite the difficulties courts face in attempting to draw distinctions between similar crimes.

Id. at 294, 103 S.Ct. at 3011. Although Harmelin narrowed Solem's proportionality review, it did not criticize the factors utilized in Solem to determine whether the sentence is grossly disproportionate to the crime.

Having again reviewed the case, we find now, as we found before, that the original sentence imposed on Defendant is "a penalty grossly out of proportion to the severity of the crime." Bartlett I, 164 Ariz. at 236, 792 P.2d at 699. We base that conclusion on several factors.

First, the circumstances of this crime, particularly the absence of violence or any threat of violence, minimize its severity. See Harmelin, ___ U. S. at ___, 111 S.Ct. at 2705-06 (comparing nonviolent crime in Solem to violence often accompanying or resulting from drug crimes). As we wrote in Bartlett I:

> Although the minor's consent will not decriminalize the sexual conduct, that consent is relevant to our inquiry into the gravity of the offense. In this case, both minors were close to the maturity line that the legislature has drawn for less serious offenses. According to their testimonies, both were willing participants in defendant's conduct. Defendant used no violent force or threats against them. Neither girl was physically injured or testified to any emotional trauma. Under these circumstances, we must certainly consider these offenses less grave than the others punishable under the same statutory scheme: second degree murder, sexual assault, taking a child for the purposes of prostitution, child prostitution, involving or using a minor in drug offenses, aggravated assault, molestation of a child, sexual exploitation of a minor, child abuse, or kidnapping. See generally A.R.S. § 13-604.01.

164 Ariz. at 234-35, 792 P.2d at 697-98.

Second, Defendant's lack of a prior record of any crime, let alone a crime involving children, further reduces the gravity of his offenses, particularly with respect to the increased sentence for his "recidivist" second offense. See Harmelin, ___ U.S. at ___, 111 S.Ct. at 2705 (discussing felonies underlying defendant's recidivism in Solem). As we stated in our original opinion:

> As to defendant's personal culpability, the record indicates that he was an "immature" young man who associated with a younger peer group because of his emotional insecurities, which included a pending divorce after marriage at a young age. He had no prior felony record and no history of assaulting young children. No evidence was presented that he intended to harm these girls, either physically or emotionally.

Bartlett I, 164 Ariz. at 235, 792 P.2d at 698. These circumstances are relevant here, not because they excuse the conduct but because the question of "gross disproportion" cannot be resolved without

considering all of the factors that aggravate or mitigate the crime.[6] To ignore the facts in determining whether a sentence is cruel and unusual would make the title of the statute -- "Dangerous Crimes Against Children" -- determine the constitutionality of the sentence imposed. Surely, if this court has a responsibility to review the constitutionality of sentences under the eighth amendment, that duty requires us to apply the standards of the federal constitution to the facts of what occurred, no matter what label the legislature has attached to the criminalizing statute. Legislatures must of necessity paint with a broad brush, leaving it to the courts to measure constitutionality by applying law to facts -- the true judicial function.

Third, we cannot in good faith ignore the realities of adolescent life described in Bartlett I: "We must . . . recognize that sexual conduct among

post-pubescent teenagers is not uncommon." 164 Ariz. at 235, 792 P.2d at 698.[7] Indeed, "[a]according to their testimonies, both [girls] were willing participants in defendant's conduct." Id. at 234, 792 P.2d at 697. While this does not make Defendant's conduct any less "criminal," it illustrates the relative severity of its harm to society. Cf. Harmelin, ___ U.S. at ___, 111 S.Ct. at 2705-06 (drug crime in a different category than "relatively minor, nonviolent crime at issue in Solem," given grave threat of violence and harm to society resulting from drug trafficking and use).

We acknowledge the legislature's prerogative to criminalize behavior and to choose the appropriate punishment. See Harmelin, ___ U.S. at ___, 111 S.Ct. at 2703. Hence, we do not view this crime as minor -- witness the seven-year sentence imposed on resentencing. But so

long as the eighth amendment contains even a narrow proportionality principle -- and Harmelin says that it does, ___ U.S. at ___, 111 S.Ct. at 2702 -- it is difficult to believe that it permits the state to imprison for forty years' hard time everyone eighteen years of age or older who twice has had intercourse with a consenting, willing, post-pubescent teenager. While the dissent views this as a "rational" method of controlling the societal threats posed by teenage sexual activity, dissent at 27 (Corcoran, J.), we believe it so drastic an approach to an age-old problem as to indicate that the threshold of constitutional limitations has been reached.

Finally, the evolution of the law and present sentencing standards tell us much about the disproportionality of the sentence. While statutory rape, along with many other felonies, may once have been a capital crime, see Harmelin,

___ U.S. at ___, 111 S.Ct. at 2691, societal standards have changed. Indeed, the modern trend in the law has been to separate the crime of statutory rape from other violent forms of rape, and concomitantly to reduce the severity of the sentence. See generally American Law Institute, Model Penal Code and Commentaries, §§ 213.1 comment 6, 213.3 comment 2 (Official Draft and Revised Comments 1980). The "minimum" sentence imposed in this case, however, for consensual sexual intercourse with two willing post-pubescent girls is comparable to the minimum sentence imposable had Defendant been provoked, become violent, killed the girls, and been convicted of second degree murder. See A.R.S. § 13-604.01(1)(a).

As we said before:

> Measuring the gravity of the offenses in this context, we must compare the harshness of the penalty. The legislature has imposed mandatory minimum

> consecutive sentences of 15 and 25 years for the first and second acts of consensual sexual conduct with a minor, with no possibility of early release. The trial court thus had no discretion to reduce the penalty according to the individual circumstances that indicated a less serious offense or a less culpable defendant.[8] Defendant, with no prior felony history, has received a 40-year penalty for sexual conduct with two consenting post-pubescent teenagers. The broad application of the statute to encompass this situation results in a penalty grossly out of proportion to the severity of the crime. Although such a harsh penalty may be justified in the context of other, more heinous crimes included within the sentencing scheme, it is not justified under the specific circumstances of this case.

Bartlett I 164 Ariz. at 236, 792 P.2d at 699 (emphasis added; footnote added).

Cases such as State v. Atwood, ___ Ariz. ___, ___ P.2d ___ (1992), State v. Beaty, 158 Ariz. 232, 762 P.2d 519 (1988), cert. denied, 491 U.S. 910, 109 S.Ct. 3200 (1989), and State v. Roscoe, 145 Ariz. 212, 700 P.2d 1312, cert. denied, 471 U.S. 1094, 105 S.Ct.

2169 (1985), see dissent at 32-33 (Corcoran, J.), illustrate the very point we make. These cases involve violent sexual crimes against young children who were incapable of giving actual, let alone legal, consent and who were later murdered by the perpetrators in question. In our view, the eighth amendment requires that a clear distinction be made between such crimes, the facts of which demand and receive the most severe penalties, and the crime that we now consider today. The proportionality principle contained in the eighth amendment requires that this defendant, whose crime involved no violence and whose victims willingly consented, be treated much less severely than those who commit violent sexual crimes against young children.

Nor is this a case in which, as the dissent suggests, our personal views "conclude our judgment." Dissent at 29

(Corcoran, J.). In measuring what is cruel and unusual, the eighth amendment "must draw its meaning from the evolving standards of decency that mark the progress of a maturing society." Trop v. Dulles, 356 U.S. 86, 101, 78 S. Ct. 590, 598 (1958) (plurality opinion). At one time, the stocks or punishment by flogging might not have been cruel and unusual. One supposes that castration would be an effective and prompt punishment for this crime, and surely a more certain, less expensive and perhaps more "rational" method of controlling sexual promiscuity, see dissent at 27 (Corcoran, J.), than forty years' imprisonment without possibility of parole. Informed by our reading of the standards of present-day civilization, we nevertheless venture that today such punishments are cruel and unusual, even were the legislature to authorize them by

statute. The eighth amendment, after all, is either a barrier to legislative action or nothing but empty words. The point we make, which the dissent avoids, is that -- as a matter of proportionality standards, not of either intra-jurisdictional comparison or comparison between modes of punishment -- a sentence of forty years without possibility of parole for consensual sex with post-pubescent teenagers reaches the threshold of gross disproportion, given the fact that the people, through their legislature, have adopted statutes under which the courts impose comparable punishment by imprisonment for crimes such as violent rape, second degree murder, and brutal assault of children. See cases cited, post, note 9.

Here, unlike in Harmelin, which dealt with a defendant convicted of an offense involving drug dealing, it can be fairly

said that the regime applied to the offense committed by Defendant is an "ancient one revived in a sudden or surprising way[, not one] calibrated with care, clarity and much deliberation." Harmelin, ___ U.S. at ___, 111 S.Ct. at 2708 (opinion of Kennedy, J.). We therefore conclude, as we did before, that Defendant's sentence was grossly disproportionate to his crimes.

2. Intra- and Inter-Jurisdictional Comparative Analysis

We have drawn the threshold inference required by Harmelin that Defendant's sentence was grossly disproportionate to his crimes. We must next conduct an intra- and inter-jurisdictional comparison to validate that inference. See Harmelin, ___ U.S. at ___, 111 S.Ct. at 2707. First, we compare Defendant's sentence to the sentences imposed in Arizona for more serious crimes. Because Harmelin did not alter the analysis under

the second and third prongs of the Solem test, see id., we will not rehash the comparison we conducted in Bartlett I; however, we set forth the original analysis supporting our conclusion in Part I of the Appendix. We quote from our original conclusion:

> We conclude that a comparison of the punishments imposed for other crimes in Arizona reveals the disproportion with which defendant was sentenced under these factual circumstances.

164 Ariz. at 237, 792 P.2d at 700.[9]

Next, we compare Defendant's sentence to sentences for the same crime in other jurisdictions. In Bartlett I, we concluded that "the mandatory minimum sentence imposed on defendant for his first offense was disproportionate to sentences received by similarly situated defendants in other jurisdictions," and that "the 25-year mandatory minimum imposed for defendant's second offense [was] also disproportionate to the

sentences imposed on similarly situated defendants in other jurisdictions." Id. at 239-40, 792 P.2d at 702-03.[10] Again, we see no point in prolonging this opinion by restating that which was thoroughly discussed in Bartlett I. We include the supporting analysis from Bartlett I as Part II of the Appendix.

We have determined that Defendant's sentence is grossly disproportionate to his crime. Our intra- and inter-jurisdictional comparison confirms our initial inference. We therefore hold that Defendant's forty-year sentence without possibility of early release violates the eighth amendment prohibition of cruel and unusual punishment.

D. Cruel and Unusual Punishment Under the Arizona Constitution

In Bartlett I, we explained that "[h]aving concluded that the sentences imposed in this case violate the eighth amendment prohibition against cruel and

unusual punishment, we do not address whether they violate art. 2, § 15 of the Arizona Constitution." 164 Ariz. at 241, 792 P.2d at 704. For the same reason, we do not address at this time the issue of whether our precedent applying a proportionality analysis -- predating Solem[11] -- would require a broader proportionality analysis under the Arizona Constitution than is appropriate under the federal constitution as interpreted in Harmelin. Nor do we consider whether other factors suggest a different standard for assessing cruel and unusual punishment under our state constitution.

DISPOSITION

Defendant's original sentence constituted cruel and unusual punishment under the limited proportionality analysis and principal articulated in

Justice Kennedy's concurring opinion in Harmelin. That sentence is vacated. We need not, therefore, reach the issues pertaining to the Arizona Constitution.

In Bartlett I, after concluding that Defendant could not constitutionally be sentenced under A.R.S. § 13-604.01, we remanded to the trial court for resentencing with instructions that Defendant be sentenced as a class 2 felon under A.R.S. §§ 13-701 and 13-702. 164 Ariz. at 241, 792 P.2d at 704. Pursuant to our instructions, the trial court has resentenced Defendant to five and one-quarter years on one count and seven years on the other, the sentences to run concurrently. That sentence stands and has not been challenged by Defendant. Because Defendant has already been resentenced, there is no need for another remand. The court of appeals'

memorandum decision is vacated. The sentence presently in effect is affirmed.

STANLEY J. FELDMAN, Chief Justice

CONCURRING:

JAMES DUKE CAMERON, Justice
(retired)

FRANK X. GORDON, JR., Justice
(retired)

C O R C O R A N, Justice, dissenting:

I. Harmelin versus Solem

I respectfully dissent. I believe that the majority properly interprets Harmelin v. Michigan, ___ U.S. ___, 111 S. Ct. 2680 (1991), as requiring a somewhat narrower proportionality analysis than that previously required by Solem v. Helm, 463 U.S. 277, 103 S. Ct. 3001 (1983). I dissent, however, because instead of applying such an analysis, the majority merely re-applies Solem.

As the author of Bartlett I, I am pleased that the majority recognizes it as a comprehensive and lucid application of Solem. However, in Arizona v. Bartlett, ___ U.S. ___, 111 S. Ct. 2880 (1991), the United States Supreme Court vacated Bartlett I and remanded the case to this court for further consideration in light of Harmelin--not for some minor editing and rearrangement.

Just what light Harmelin casts--with its 5 separate opinions--is concededly not easy to see. I agree with the majority that Justice Kennedy's opinion, although joined only by Justices O'Connor and Souter, articulates the proportionality analysis now required by the eighth amendment.[12] I disagree, however, with the majority's application of that analysis.

Under Justice Kennedy's analysis, a court must first determine whether it is reviewing "the rare case in which a threshold comparison of the crime committed and the sentence imposed leads to an inference of gross disproportionality." Harmelin, ___ U.S. at ___, 111 S. Ct. at 2707. If the threshold comparison does not lead to an inference of gross disproportionality, the analysis is complete; the sentence does not offend the eighth amendment. If, on the other hand, the threshold comparison does lead

to an inference of gross disproportionality, the court may find it useful to conduct intra- and inter-jurisdictional proportionality reviews. Harmelin, ___ U.S. at ___, 111 S. Ct. at 2707.

The majority begins its analysis by stating, "In Bartlett I, we held that the 'broad application of the statute to encompass [Defendant's] situation results in a penalty grossly out of proportion to the severity of the crime.' We reached this conclusion after thorough analysis of the facts . . . ." (emphasis in original) (citation omitted). Then, after re-analyzing the exact same facts that we analyzed in Bartlett I, the majority concludes that "the original sentence imposed on Defendant is 'a penalty grossly out of proportion to the severity of the crime.'" (Citation omitted.)

While I would have to agree that this analysis is consistent with the gross disproportionality analysis articulated by Justice Kennedy, it is wholly inconsistent with the gross disproportionality analysis conducted by Justice Kennedy. Justice Kennedy's analysis measured the severity of Harmelin's crime not by analyzing the particular facts and circumstances of the crime, but rather by analyzing the threat posed to the individual and to society by the commission of that crime. See Harmelin, ___ U.S. at ___, 111 S. Ct. at 2705-07 (In determining whether Harmelin's crime was momentous enough to warrant a life sentence without parole, Justice Kennedy did not discuss the fact that during the commission of his crime Harmelin was neither violent nor did he injure anyone. Rather, Justice Kennedy discussed numerous ways in which illegal drugs threaten the individual and

society.). Moreover, 5 Justices expressly rejected Harmelin's argument that his sentence was unconstitutional because "the sentencing judge was statutorily required to impose it, without taking into account the particularized circumstances of the crime and of the criminal," and held that the eighth amendment allows a judge to impose a sentence without taking into account the particulars of the crime or of the criminal. See Harmelin, ___ U.S. at ___, ___, ___, ___, 111 S. Ct. at 2684, 2702-02, 2707-09. In sum, Harmelin provides no support for the majority's discussion of the indispensability of considering the facts of defendant's crimes or for its consideration of those facts in determining whether defendant's sentences are grossly disproportionate to the severity of his crimes.

In addition to re-analyzing the facts of defendant's crimes, the majority bases its conclusion that his sentences are grossly disproportionate to the severity of his crimes by considering 4 additional factors. The first is "the circumstances of [the] crime." As just noted, however, a fair reading of Harmelin compels the conclusion that in conducting our gross disproportionality analysis, we should not take into account the circumstances of the crime.

The second factor is defendant's "lack of a prior record." In Harmelin, however, Justice Kennedy did not mention the fact that Harmelin had no prior felony convictions. Similarly, 5 Justices expressly rejected Harmelin's argument that "it is 'cruel and unusual' to impose a mandatory sentence of such severity, without any consideration of so-called mitigating factors such as, in his case, the fact that he had no prior

felony convictions." Harmelin, ___ U.S. at ___, 111 S. Ct. at 2701 (emphasis added). Under Harmelin's gross disproportionality analysis, this court should not take into account defendant's lack of a prior record.

The third factor the majority considers is "the realities of adolescent life." The majority appears to believe that the crimes committed in this case should not be considered severe because they are "not uncommon." By affirming Harmelin's sentence, however, the United States Supreme Court appears to believe that even crimes which are "not uncommon," such as possessing illegal drugs may be considered severe enough to impose the harshest punishment available, save death. See Harmelin, ___ U.S. at ___, 111 S. Ct. at 2705. Indeed, it is precisely because the crimes committed by defendant and Harmelin are "not uncommon"

that they pose such a threat to the individual and to society.

Further, Harmelin makes clear that it is not for this court to weigh the realities of adolescent life in determining the propriety of a particular sentence. As Justice Kennedy pronounced in Harmelin,

> [The fixing of prison terms for specific crimes involves a substantive penological judgment that, as a general matter, is "properly within the province of legislatures, not courts." Determinations about the nature and purposes of punishment for criminal acts implicate difficult and enduring questions respecting the sanctity of the individual, the nature of law, and the relation between law and the social order. "As a moral or political issue [the punishment of offenders] provokes intemperate emotions, deeply conflicting interests, and intractable disagreements." The efficacy of any sentencing system cannot be assessed absent agreement on the purposes and objectives of the penal system. And the responsibility for making these fundamental choices and implementing them lies with the legislature.

Harmelin, ___ U.S. at ___, 111 S. Ct. at 2703 (emphasis added) (citations omitted). Under Harmelin's gross disproportionality analysis, the legislature, not this court, must determine what role, if any, the realities of adolescent life play in fixing prison terms for defendants convicted of sexual misconduct with children.

This is certainly not to say that this court may uphold as constitutional a sentence that has no rational basis. It may not. Conversely, however I believe that Harmelin requires this court to uphold as constitutional a sentence that does have a rational basis. See Harmelin, ___ U.S. at ____, 111 S. Ct. at 2706 ("[T]he Michigan Legislature could with reason conclude that the threat posed to the individual and society by possession of [more than 650 grams] of cocaine . . . is momentous enough to warrant the deterrence and

retribution of a life sentence without parole. . . . [A] rational basis exists for Michigan to conclude that [Harmelin's] crime is as serious and violent as the crime of felony murder without specific intent to kill, a crime for which 'no sentence of imprisonment would be disproportionate . . . .'") (citations omitted).

The fourth and final factor the majority considers is "the evolution of the laws and present sentencing standards." The majority states that "societal standards have changed," and "the modern trend in the law has been to separate the crime of statutory rape from other violent forms of rape, and concomitantly to reduce the severity of the sentence." What this statement ignores, however, is that Harmelin allows societal standards to change back. And, by enacting the statutes at issue in this case, the Arizona Legislature has

undoubtedly chosen to adopt a more severe punishment than that espoused by the "modern trend." Further, modern trends are, at best, an elastic and subjective standard by which to measure the constitutionality of a sentence of imprisonment under the eighth amendment. Because our inquiry is not whether defendant's sentences comport with the modern trend, but rather whether a reasonable person might think them proper, this court should, as Harmelin instructs, leave the consideration of modern trends to the legislature. Harmelin, ___ U.S. at ___, ___, 111 S. Ct. at 2703, 2706; see also Lochner v. New York, 198 U.S. 45, 75-76, 25 S. Ct. 539, 546-47 (1905) (Holmes, J., dissenting) ("Some . . . laws embody convictions or prejudices which judges are likely to share. Some may not. But a Constitution is not intended to embody a particular [theory]. It is made for

people of fundamentally differing views, and the accident of our finding certain opinions natural and familiar or novel, and even shocking, ought not to conclude our judgment upon the question whether statutes embodying them conflict with the constitution of the United States.")

Likewise, the majority's comparison of defendant's sentences to being sent to the stocks, being flogged, or being castrated--which all deal with severe modes of punishment--is not helpful in determining whether a severe term of punishment is constitutional after giving meaning to the eighth amendment by reference to "the evolving standards of decency that mark the progress of a maturing society." What is helpful, however, is to recognize that our society, via the Arizona Legislature, has determined that sexual intercourse between a person who is at least 18 years of age and a child is not in conformity

with our "standards of decency." While it might be decent to some people or even in some societies, ours has "progressed and matured" to the point of condemning such conduct.

The majority makes two other comparisons which, although technically correct, tell only half of the story. First, the majority states that "[t]he 'minimum' sentence[s] imposed in this case . . . [are] comparable to the minimum sentence[s] imposable had Defendant been provoked, become violent, killed the girls, and been convicted of [two counts of] second degree murder." The rest of the story is that <u>if</u> this hypothetical had played itself out, it is more likely that the sentencing judgment would have imposed the maximum sentences of 60 years (25 years for the first count and 35 years for the second count), rather than the minimum sentences of 40 years (15 years for the first count

and 25 years for the second count) as he did in this case.[13]

Second, the majority's statement that "the people, through their legislature, have adopted statutes under which the courts impose comparable punishment[s] by imprisonment for crimes such as violent rape, second degree murder, and brutal assault of children," is simply inaccurate. Although it is true that the range of punishment for the crimes committed by defendant and the crimes of violent rape, second degree murder, and the brutal assault of children are the same, there is no evidence that "courts impose comparable punishment" for these offenses. Indeed, it is not only counterintuitive to believe that courts do so, it is inconsistent with the record in this case, which suggests that the reason the court imposed upon defendant the minimum sentences imposable was because of the relatively nonviolent

nature of his crimes. By comparing defendant's sentences to a parade of horrible and unsound "what ifs," it is the majority, not I, who fails to give meaning to the eighth amendment by reference to "the evolving standards of decency that mark the progress of a maturing society."

After revealing what I consider to be fatal flaws in the majority's analysis under Harmelin, I now advance what I consider to be the appropriate proportionality analysis as articulated and conducted by Justice Kennedy. First, we must conduct an inquiry to determine whether "a threshold comparison of the crime committed and the sentence imposed leads to an inference of gross disproportionality." Harmelin, ___ U.S. at ___, 111 S. Ct. at 2707. In conducting this inquiry, I believe that we must look not at the facts or particular circumstances of the crime,

but we must decide whether the legislature could, with reason, conclude that the threat posed to the individual and to society by defendant's offenses is momentous enough to warrant the deterrence and retribution of the sentences imposed. See Harmelin, ___ U.S. at ___, 111 S. Ct. at 2706. If such a rational basis exists, then the sentences imposed are not grossly disproportionate to the severity of defendant's crimes. Id.

While I do not know exactly what factors the legislature considered in enacting the Sexual Conduct with a Minor statute, A.R.S. § 13-1405, or adopting the sentencing guidelines of the Dangerous Crimes Against Children statute, A.R.S. § 13-604.01, I believe that the sentences imposed in this case are not grossly disproportionate to the offenses committed in light of the threat posed to the individual and to society by

engaging in sexual misconduct with children.

II. The Threat Posed to the Individual

The threat of harm posed to children who become the victims of sexual misconduct is significant. In considering the statutes at issue in this case, the legislature was presented with and considered no less than 3 types of individual harm: emotional, social, and physical. Sexual Offenses; Child Victims; Hearings on S.B. 1021 Before the Comm. on Judiciary, 37th Leg., 1st Sess. 1-15 (Feb. 18, 1985) (hereinafter Child Victims).

Children who become the victims of sexual misconduct often develop emotional problems. One mother testified that as a victim of sexual misconduct, her daughter "has behavioral problems and worse of all, she has stated, '. . . I never want to grow up because adults don't do fun things.'" Child Victims, supra, at 9.

In addition, children who are the victims of sexual misconduct often engage in misconduct as adults. See, e.g., State v. Atwood, ___ Ariz. ___, ___, ___ P.2d ___, ___ (1992) (defendant molested as child engaged in sexual misconduct as adult). Concomitantly, children who suffer from emotional problems often suffer in their social relationships.

History has taught us that children who become the victims of sexual misconduct are many times physically harmed and even murdered by their attackers to eliminate the children as witnesses. See, e.g., Child Victims, supra, at 9 (mother testified that daughter had been victimized by man who told her that if she told anyone he would kill her and her mother); Atwood, ___ Ariz. at ___, ___ P.2d at ___, (defendant convicted of murdering 8-year-old girl had told friend he "had considered 'picking up' another

child and that 'this time he would make sure the child wouldn't talk'"); State v. Beaty, 158 Ariz. 232, 762 P.2d 519 (1988) (defendant sexually molested and murdered 13-year-old child); State v. Castaneda, 150 Ariz. 382, 724 P.2d 1 (1986) (defendant sexually molested and murdered 12-year-old child); State v. Roscoe, 145 Ariz. 212, 700 P.2d 1312 (1984) (defendant sexually molested and murdered 7-year-old child).[14] Not quite so traumatic, but physical harm nonetheless, is the pain suffered by the children during and after the sexual misconduct. Finally, sexual misconduct subjects children to diseases such as AIDS, and unwanted pregnancy.

III. The Threat Posed to Society

During the hearings on the statutes at issue in this case, Jim Skelly, the Chairman of the House Judiciary Committee, made the following statement:

> Crimes against children have increased by epidemic proportions not only in the State of Arizona but throughout our Nation. According to an article in the Arizona Republic, February 17, 1985, child abuse has increased 35 percent nationally in the last year. Current figures for the City of Phoenix show that in 1984 as compared to 1983, assaults and aggravated assaults against minors increased by 36 percent, and although rape against minors decreased by four percent, other sex [offenses] against minors increased by 18 percent. It is not necessary to reiterate to you the tragic happenings in Tucson and Tempe. It is important to note that Frank Jarvis Atwood has a long history of child molestation and has been released on parole after only serving a short sentence. In addition, Mr. Castaneda was also released on parole and we all know what happened to the little Perry boy.
>
> I think it is timely that this month's Reader's Digest printed an article entitled, "Why Do We Tolerate These Crimes Against Children?"

Child Victims, supra, at 2. Chief Assistant Attorney General Steven J. Twist also recognized that "crimes against children have made many of our urban centers uninhabitable and cause

many of us to have fear and frustration over the criminal justice system." Child Victims, supra, at 3.

In addition, the mother of an 8-year-old girl who has been abducted and murdered by a convicted child molester emphasized the anguish and grief suffered not only by the victim's family but also by the victim's friends and classmates. Child Victims, supra, at 14. That same mother stressed "It is time we realize we need to protect our children because they are our future. If we do not protect our children, what will it be like fifteen years from now?" Id.

In concluding that Harmelin's sentence was not grossly disproportionate to the severity of his crime, Justice Kennedy recognized that the "[p]ossession, use and distribution of illegal drugs represents one of the greatest problems affecting the health and welfare of our population.'" Harmelin, ___ U.S. at ___,

111 S. Ct. at 2705 (citation omitted). In concluding that defendant's sentences are not grossly disproportionate to the severity of his crimes, I would recognize that sexual offenses against children represent a similar problem. In other words, I believe a rational basis exists for defendant's sentences.

Because I find that defendant's sentences are not grossly disproportionate to the severity of his crimes, no intra- or inter-jurisdictional proportionality review is appropriate. Harmelin, ___ U.S. at ___, 111 S. Ct. at 2707. Similarly, because this court's analyses of art. 2, § 15 of the Arizona Constitution have consistently been identical to analyses of its federal counterpart, I believe that no independent analysis of the state constitution is appropriate. See, e.g., State v. Mulalley, 127 Ariz. 92, 95-97, 618 P.2d 586, 589-91 (1980), overruled on

other grounds, State v. Noble, 152 Ariz. 284, 731 P.2d 1228 (1987); State v. Davis, 108 Ariz. 335, 337-38, 498 P.2d 202, 204-05 (1972).

IV. Conclusion

The result in Harmelin is that a defendant in Michigan may constitutionally be sentenced to life imprisonment without possibility of early release for a first felony conviction of possession of more than 650 grams of cocaine. From that result, it seems clear that the Arizona Legislature has the constitutional authority to require a 23-year-old defendant on a first conviction who has had sexual intercourse with two different 14-year-old girls to be imprisoned for a total of 40 years without possibility of early release.

I read Harmelin as reinforcing society's declaration of war against drugs. In light of Harmelin, I believe that the Arizona Legislature is entitled

to declare war against the sexual abuse of children.

Robert J. Corcoran, Justice

MOELLER, J., dissenting

I agree with Justice Corcoran's dissent. The United States Supreme Court remanded this case to us to reconsider in light of Harmelin. Putting aside the difficulties of interpreting every nuance of Harmelin, one fact is incontrovertible: the United States Supreme Court held that Michigan may constitutionally impose lifetime imprisonment without possibility of parole upon a first-time offender for possession of 650 grams of cocaine. That being the case, I fail to understand why Arizona may not constitutionally impose a "flat" fifteen-year term on an adult convicted of sexual conduct with a minor to be followed by a "flat" twenty-five-year term for another conviction for a similar offense with a different minor.

Because our review is limited to the constitutionality of the sentence, rather

than to its wisdom, I believe we are compelled to affirm the original sentence. The majority's arguments, including those relative to "the realities of adolescent life" (majority opinion at 14), are appropriately addressed to the legislature, which is charged with the responsibility of determining the wisdom of the punishment. Our role is much more limited -- we may only determine whether the punishment is constitutional. In my opinion, Harmelin teaches that it is.

James Moeller
Vice Chief Justice

APPENDIX

Because our opinion in Bartlett I was vacated by the United States Supreme Court, we reproduce here the intra- and inter- jurisdictional comparisons we conducted there.

Part I

Sentences Imposed for Other Crimes In Arizona
quoting Bartlett I, 164 Ariz at 236-37, 792 P.2d 699-700

We next examine the sentences imposed in Arizona on defendants who commit crimes more serious than this defendant's. Solem, 463 U.S. at 292, 103 S.Ct. at 3010; Jonas, 164 Ariz. at 249, 792 P.2d at 712. We have previously disapproved the practice of comparing only those crimes encompassed within the challenged sentencing statute to conclude that the punishment is proportionate because all crimes within the statutory scheme receive the same penalties. See Jonas, 164 Ariz.

at 249-250, 792 P.2d at 712-713, disapproving the analysis in State v. Smith, 156 Ariz. at 526, 753 P.2d at 1182, and State v. Crego, 154 Ariz. at 280, 742 P.2d at 291.

However, a comparison of the other crimes punishable under the same mandatory sentencing provisions of A.R.S. § 13-604.01 is helpful in this case to show that more serious offenses do not receive any greater punishment. For example, second degree murder, forcible sexual assault, taking a child for the purposes of prostitution or involving a child in a drug offense are all considered first degree crimes against children, subject to the same mandatory minimum sentences of 15 and 25 years that defendant received. A.R.S. § 13-604.01(A), (D). More potentially serious crimes than those committed here, such as aggravated assault, child molestation, child abuse, or kidnapping,

are subject to a lesser minimum sentence of 12 years for the first offense and 23 years for the second offense. See A.R.S. § 13-604.01(B), (D).

Other more serious crimes that do not involve children similarly receive lesser penalties than those mandated in this case. Class 2 felonies not involving a dangerous weapon or threatened physical injury are punishable for a first offense with a minimum term of 5.25 years, a presumptive term of 7 years, and a maximum of 14 years, with early release potentially available after only half the sentence has been served. A.R.S. §§ 13-701, -702. Such first-time offenders are eligible for probation, or, if imprisoned, can earn early release credits of 1 day for each 2 days served. A second offense carries a minimum term of 7 years, a presumptive term of 10.5 years, and a maximum of 21 years, with early release potentially available

after two-thirds of the sentence has been served. A.R.S. §§ 13-701 -702, -604(B). The first and second sentences are presumed to run consecutively but the trial court has discretion to make them concurrent by stating its reasons on the record. A.R.S. § 13-708. Included within this scheme of punishment for class 2 felonies are the following crimes, all potentially more serious than the offenses committed by this defendant: kidnapping, A.R.S. § 13-1304; sexual assault of an adult, A.R.S. § 13-1406; first degree burglary of a residential structure, A.R.S. § 13-1508; and arson of an occupied structure, A.R.S. § 13-1704. Additionally, manslaughter, a class 3 felony, A.R.S. § 13-1103, is punishable with a minimum sentence of 3.75 years, a presumptive term of 5 years, and a maximum term of 10 years. A.R.S. § 13-701(C)(2), -702(B).

We also compare the circumstances under which other defendants have been subjected to the same mandatory sentencing scheme. In State v. Taylor, we upheld an aggregate prison term of 2,975 years for 85 counts of dangerous crimes against children. 160 Ariz. 415, 773 P.2d 974 (1989). In that case, the defendant performed and photographed various sexual acts with children aged from 18 months to 8 years old, and many other unidentified small children. He also had a prior criminal history of sex crimes with young children in two other states. We recognized the "irreparable harm which he has caused to the normal development of numerous children," and his inability "to control his proclivity for sexual conduct with children" as important factors justifying the harshness of the sentence. Taylor, 160 Ariz. at 423, 773 P.2d at 982. In State v. Crego, the court of appeals

upheld two consecutive 20-year prison terms for a defendant who molested 3 different victims under age 15 a few months after he had been released from prison for a similar offense, and while he was on parole. 154 Ariz. at 279, 742 P.2d at 290. In State v. Smith, the court of appeals also upheld a mandatory prison sentence of 91 years for a defendant who repeatedly molested a 10-year-old boy and photographed the numerous incidents on approximately 60 occasions. 156 Ariz. at 520, 753 P.2d at 1176. Defendant also points out other cases in which harsh sentencing provisions were appropriately applied in situations involving repeated and cruel sexual offenses against small children. See, e.g., State v. Cummings, 148 Ariz. 588, 716 P.2d 45 (App. 1985) (defendant, a scoutmaster, performed multiple acts of oral and anal sex on 12- to 13-year-old male victims; was sentenced to

5 concurrent prison terms ranging from 7 to 15.75 years); State v. O'Neill, 117 Ariz. 343, 572 P.2d 1181 (1977) (defendant, while babysitting, molested a two-year-old infant, resulting in a tear between her vagina and rectum; was sentenced to 20 years to life). These and other cases stand in stark contrast to the circumstances under which this defendant was sentenced in this case.

We conclude that a comparison of the punishments imposed for other crimes in Arizona reveals the disproportion with which defendant was sentenced under these factual circumstances.

Part II

Sentences Imposed for the Same Crime In Other States
quoting Bartlett I, 164 Ariz. at 237-40, 792 P.2d 700-03

We also examine the punishment imposed for the same crime in other jurisdictions. Solem, 463 U.S. at 292, 103 S.Ct. at 3010. This comparison is

difficult because the offenses defendant committed are chargeable as a broad variety of crimes with varying punishments. However, we have attempted to compare penalties for the crimes closest to those committed here: consensual, nonincestuous, heterosexual intercourse with a 14-year-old.

Additionally, we compare each of defendant's sentences individually, keeping in mind that the 15-year sentence was imposed for a first offense, and that the 25-year sentence was imposed for a second offense. We also consider only those sentences imposed for a defendant with no prior felony convictions, other than the first offense used as an enhancement factor for the second offense. Our focus is necessarily on the mandatory minimum sentences imposed in other jurisdictions, because that is what defendant received here. We do not consider significant the state's argument

that defendant could have received maximum sentences in other jurisdictions greater than the minimums imposed in this case because the record clearly indicates that the trial court did not find aggravating factors justifying maximum sentences under these circumstances.

(1) 15-year Sentence for First Offense

In 10 jurisdictions, defendant's offenses would either not be a crime or would be punishable only as a misdemeanor with a sentence of less than one year and/or a fine.[15] For a first felony offense in the remaining jurisdictions, defendant would have faced a minimum penalty of one, two, or three years,[16] with probation often available. Thus, our statute is unique among all jurisdictions in that it imposes a minimum mandatory term of 15 years, which is 5 times higher than that imposed in any other jurisdiction. In all jurisdictions but Arizona, the sentencing

judge has a wide range of discretion in imposing a sentence at the bottom of the statutory range that fits the individual circumstances of the crime. Although the maximum allowable sentence in some jurisdictions would have fallen within the range of sentencing provided for a first offender under A.R.S. § 13-604.01(A), in no jurisdiction would the sentencing judge be required to impose a sentence of more than 3 years for the identical offense. Thus, our legislature has mandated a penalty potentially disproportionate to an individual criminal act or defendant. See J. Howe, Thoughts on Mandatory Sentencing, Ariz. Bar J. June-July 1985, at 24-25.

Such potential disproportionality is not enough to allow us to find defendant's sentences cruel and unusual. See State v. Taylor, 160 Ariz. 415, 773 P.2d 974 (1989) ("Although on the

national spectrum Arizona deals with crimes against children more severely than many other states, '[t]he Eighth Amendment is not violated every time a state reaches a conclusion different from a majority of its sisters over how to best administer its criminal laws.' Spaziano v. Florida, 468 U.S. 447, 464, 104 S.Ct. 3154, 3164, 82 L.Ed.2d 340, 355 (1984)"). Such potential differences in sentencing are "a mark of federalism, not unconstitutionality." State v. Bishop, 717 P.2d 261, 272 (Utah 1986).

In this case, however, the potential disproportion between the sentences defendant received and those sentences actually imposed on other similarly situated defendants in other jurisdictions is actual. Defendant has supplied us with a myriad of examples in the published case law of other jurisdictions. A few representative citations illustrate this point:

Diefenderfer v. State, 745 P.2d 556 (Wyo. 1987) (defendant pleaded guilty to third degree sexual assault of a girl under 14; the execution of his sentence of 3 to 5 years suspended and 4 years probation imposed); State v. DeJesus, 10 Conn. App. 591, 524 A.2d 1156 (1987) (defendant pleaded guilty to second degree sexual assault of a 14-year old; sentence of 5 years upheld); State v. LaBorde, 234 La. 28, 99 So.2d 11 (1958) (defendant convicted of carnal knowledge of 14-year old; sentenced to one year, 9 months); State v. Smart, 147 La. 174, 170 So.2d 365 (1965) (defendant convicted of carnal knowledge of a 13-year old; sentenced to 3 years); State v. Rodriguez, 179 N.J. Super. 129, 430 A.2d 957 (1981) (defendant convicted of sexual assault of a 13-year old; sentenced to 4 years); State v. Newell, 82 N.C. App. 707, 348 S.E.2d 158 (1986) (defendant convicted of taking indecent liberties

with a consenting child between 13 and 16; sentenced to 3 years); State v. Hartman, 145 Wis.2d 1, 426 N.W.2d 320 (1988) (defendant convicted of statutory rape of a 14-year old; sentenced to a term of not more than 3 years, but suspended and defendant placed on probation with 6 months in county jail work release program). Additionally, defendant's appellate counsel has avowed to the court that he "has diligently search [sic] two centuries of case law of each of our 50 sister states. This required the review of just over 1,600 cases. Not one case was found where a similarly situated defendant received an aggravated sentence remotely comparable to that imposed as a mandatory minimum upon Mr. Bartlett."

Given this authority, we conclude that the mandatory minimum sentence imposed on defendant for his first offense was disproportionate to sentences received by

similarly situated defendants in other jurisdictions.

(2) 25-year sentence for second offense

A comparison of the 25-year mandatory minimum sentence defendant received for the second offense with those imposed in other jurisdictions is complicated by the enhancement of defendant's second sentence because the first count was treated as a prior predicate felony. Most jurisdictions punish repeat offenders more stringently, and enhancement of penalties on the basis of prior offenses has been consistently upheld against eighth amendment attacks. See, e.g., Rummel, 445 U.S. at 276, 100 S.Ct. at 1140; Cocio v. Bramlett, 872 F.2d 889, 893 (9th Cir. 1989). However, we are mindful that the legislature, in requiring a 25-year minimum sentence for a second offense implicitly assumed that it was enhancing a constitutionally proportionate minimum

sentence of 15 years for a first offense. We have already found the minimum sentence for the first offense to be disproportionate to the facts of this case. Additionally the "prior" felony in this case was one for which defendant was simultaneously tried and sentenced with the second offense, a factor not existing in other jurisdictions. See A.R.S. § 13-604(H).

Also complicating our analysis is the mandatory consecutive nature of the two sentences along with the absence of the availability of parole. We have previously refused to find the consecutive nature of two sentences for two separate crimes to be a factor that would render the second sentence disproportionate. Jonas, 164 Ariz. at 249, 792 P.2d at 712. We thus do not consider that factor here. [17] Nonavailability of parole, however, is a factor in determining proportionality, although the

absence of parole, in itself, does not make a sentence disproportionate. Solem, 463 U.S. at 297 and n.24, 103 S.Ct. at 1151 and n.24; Jonas, 164 Ariz. at 249, 792 P.2d at 712. In this case, the absence of parole availability requires us to reconsider that defendant will serve the entire 25-year sentence for the second offense.

Despite these difficulties a comparison of what penalties defendant would face for a second offense in other jurisdictions, although not as clear as the comparison for a first offense, compels the conclusion that defendant would be subject to a much lighter minimum mandatory sentence for his second offense in all but one state.

In Nebraska, defendant would be subject to a statutory range of 25 to 50 years for a second conviction of sexual assault involving a consenting child less than 16 years old, and would not be eligible

for parole. Neb. Rev. Stat. § 28-319(1)(c), (3). However, as the United States Supreme Court notes in Solem v. Helm, a finding that a defendant would have received an identically harsh sentence in one other state is also a clear indication that he "could not have received such a severe sentence in 48 of the 50 states." 463 U.S. at 299, 103 S.Ct. at 3014 (emphasis added). Furthermore, we have not been advised by the state of any defendant charged in Nebraska with offenses similar to Bartlett's actually receiving such a harsh sentence. Rather, the published cases that we have found challenging the mandatory Nebraska sentence for a second offense have involved more heinous offenses, including forcible rape with serious physical injuries to the victim. See, e.g., State v. Brand, 219 Neb. 402, 363 N.W.2d 516 (1985) (defendant received 35-year sentence for his second

conviction of first-degree sexual assault involving the use of force; sentence found not disproportionate to crime). Under these circumstances, we cannot find the 25-year mandatory minimum sentence for defendant's second offense to be proportionate merely on the basis of the Nebraska statute.

Except for Nebraska, no other jurisdiction imposes a mandatory minimum sentence of more than 10 years for a second offense similar to defendant's. In no jurisdiction did we find the particularly harsh combination of provisions present here including both mandatory consecutive sentencing and nonavailability of parole. We must conclude, therefore, that the 25-year mandatory minimum imposed for defendant's second offense is also disproportionate to the sentence imposed on similarly situated defendants in other jurisdictions.

Based on the above analysis, we hold that defendant's sentences of 15 years for the first offense and 25 years for the second offense are disproportionate to the crimes he committed under the specific facts of this case, and thus violate the eighth amendment proscription against cruel and unusual punishment. This is a narrow holding limited to the facts and circumstances of this case. The Supreme Court has said that successful challenges to the proportionality of particular sentences are "exceedingly rare." Solem, 463 U.S. at 289-90, 103 S.Ct. at 3009. This is such a rare case.

END NOTES

[1] While Justice Scalia stated that Solem was wrong, ___ U.S. at ___, 111 S.Ct. at 2686, he did not say -- and could not, given only Chief Justice Rehnquist's concurrence -- that it was overruled.

[2] The vast majority of federal and state courts that have assessed the validity of the Solem proportionality analysis in the wake of Harmelin have applied or assumed the validity of at least the gross disproportionality standard advocated by Justice Kennedy. See United States v. 38 Whalers Cove Drive, 954 F.2d 29 (2nd Cir. 1992) (applying Solem analysis); United States v. Gordon, 953 F.2d 1106 (8th Cir. 1992) (conducting review based on Justice Kennedy's opinion in Harmelin); Tart v. Massachusetts, 949 F.2d 490, 503-04 & n.16 (1st Cir. 1991); United States v. Salmon, 944 F.2d 1106, 1130-31 (3rd Cir. 1991), cert. denied, ___ U.S. ___, 112 S.Ct. 1213 (1992); United States v. Hopper, 941 F.2d 419, 422 (6th Cir. 1991); United States v. Jones, 950 F.2d 1309, 1317 (7th Cir. 1991); United States v. Contreras, 937 F.2d 1191, 1195-96 & n.3 (7th Cir. 1991); United States v. Manuel, 944 F.2d 414, 417 (8th Cir. 1991); United States v. Johnson, 944 F.2d 396, 408-09 (8th Cir.) (no further analysis undertaken unless sentence grossly disproportionate to crime), cert. denied, ___ U.S. ___, 112 S.Ct. 646 (1991); United States v. McLean, 951 F.2d 1300, 1303 (D.C. Cir. 1991) ("Eighth Amendment's proportionality principle applies to noncapital sentences"); United States v. Curtis, 33 M.J. 101, 108 n.9 (C.M.A. 1991), cert. denied, ___ U.S. ___, 112 S.Ct. 1177 (1992); People v. Weddle,

2 (continued)
2 Cal. Rptr.2d 714, 715-17 & n.1 (Cal. App. 1991) (discussing difficulty in interpreting multiple opinions in Harmelin); People v. Gaskins, 825 P.2d 30, 34 n.10 (Colo. 1992); Isom v. State, 408 S.E.2d 701, 702-03 (Ga. 1991); State v. Brown, 825 P.2d 482, 491 (Idaho 1992). See also United States v. Thompson, 944 F.2d 1331 (7th Cir. 1991) (would not address whether standard is disproportionality or gross disproportionality since under the circumstances sentence was neither), cert. denied, ___ U.S. ___, 112 S.Ct. 1177 (1992); United States v. California Publishers Liquidating Corp., 778 F.Supp. 1377, 1387 (N.D. Texas 1991); State v. Cavanaugh, 1991 WL 170184, at *2 (Conn. Super.) (sentence not inappropriate or disproportionate given nature of offense, character of offender, public interest protected, and deterrent purpose of sentence), cert. denied, 598 A.2d 1100 (Conn. 1991).

Indeed, only a handful of courts and judges have expressed the view that Harmelin overruled Solem. See United States v. LaFleur, 952 F.2d 1537, 1547 (9th Cir. 1991) (citing Harmelin for proposition that eighth amendment does not require assessment of appropriateness of sentence in noncapital cases); People v. Knott, 586 N.E.2d 479, 497 (Ill. App. 1991) ("Solem v. Helm was expressly overruled in Harmelin"). See also State v. Ortega, 817 P.2d 1196, 1220 (N.M. 1991) (Baca, J. concurring in part and dissenting in part) (Harmelin "has cast doubt on the vitality of Solem"). We believe these courts misinterpret Harmelin.

[2] (continued)

Finally, several cases have either applied Harmelin's holding that mandatory sentencing is not unconstitutional merely because it is mandatory, or affirmed sentences under Harmelin's result by comparing sentences to the sentence approved in Harmelin, most commonly in drug cases. See United States v. Lowden, 955 F.2d 128 (1st Cir. 1992); United States v. Kramer, 955 F.2d 479, 488 (7th Cir. 1992); United States v. Knapp, 955 F.2d 566, 570 (8th Cir. 1992) (defendant's claim that sentence for participation in drug conspiracy was cruel and unusual punishment "simply lacks merit"); United States v. Campusano, 947 F.2d 1, 4 (1st Cir. 1991) (mandatory sentencing not cruel and unusual punishment); United States v. Torres, 941 F.2d 124 (2nd Cir. 1991); United States v. Pickett, 941 F.2d 411 (6th Cir. 1991); United States v. Dunson, 940 F.2d 989 (6th Cir. 1991), cert. denied, ___ U.S. ___, 112 S.Ct. 1488 (1992); United States v. Harvey, 946 F.2d 1375 (8th Cir. 1991); United States v. Van Winrow, 951 F.2d 1069, 1071 (9th Cir. 1991); State v. Smith, 1991 WL 215646, at *3 (Del. Super.) (severe mandatory sentences not cruel and unusual under Harmelin), appeal dismissed, ___ A.2d ___, 1991 WL279846 (Del. 1991); Leftwich v. State, 589 So.2d 385 (Fla. App. 1991) (prisoner smuggling marijuana into prison). See also State v. Hermann, 474 N.W.2d 906, 911 (Wis. App.) (citing Harmelin and concluding that sentence for drug conviction was not "shocking to the public sentiment"), review denied, 477 N.W.2d 286 (Wis. 1991).

[3] At the same time, we believe that under the views of four members of the Court (Justices White, Blackmun, Stevens, and Marshall), the Solem analysis we employed in Bartlett I would stand, and that the result we reached would presumably be valid.

It is also worth noting that we expressly considered in Bartlett I many of the principles identified by Justice Kennedy, including the properly legislative function of fixing sentences for specific crimes, Harmelin, ___ U.S. at ___, 111 S.Ct. at 2703, and the rarity of finding disproportion because "we lack clear objective standards to distinguish between sentences for different terms of years." Id. at ___, 111 S.Ct. at 2705. Accord Bartlett I, 164 Ariz. at 233, 792 P.2d at 696 (legislature has "broad authority . . . in determining the types and limits of punishments for crimes") (quoting Solem, 463 U.S. at 290, 103 S.Ct. at 3009); id. at 240, 792 P.2d at 703 ("The Supreme Court has said that successful challenges to the proportionality of particular sentences are 'exceedingly rare.' Solem, 463 U.S. at 289-90, 103 S.Ct. at 3009. This is such a rare case."). We adhere to those principles in this opinion.

[4] We use fictitious names for the teenage girls. See Bartlett I, 164 Ariz. at 230 n.1, 792 P.2d at 693 n.1.

[5] The current text of § 13-1405(B) makes sexual conduct with a minor under fourteen a class 2 felony punishable pursuant to § 13-604.01. The statute was amended in 1990; at the time Defendant committed his crime, the relevant age was fifteen. See 1990 Ariz. Sess. Laws, ch. 384, § 2.

[6] In examining the facts of the crime and the criminal, we do not, as argued by the dissent, apply Solem instead of Harmelin. Dissent at 23 (Corcoran, J.). We do not allude to Bartlett I because it is a "comprehensive and lucid application of Solem," dissent at 23 (Corcoran, J.), but, rather, because it contains a "comprehensive" analysis of Defendant's offenses. That analysis was repeated ante because we read Justice Kennedy's opinion in Harmelin to mean that it is the circumstances of the crime and the criminal that must be considered in determining gross disproportion. As the dissent concedes, this approach is consistent with the analysis articulated by Justice Kennedy. Dissent at 24 (Corcoran, J.).

Nor is that dissent correct in arguing that five justices rejected consideration of the particularized circumstances of the crime and the criminal in determining the question of disproportionality. See dissent at 25 (Corcoran, J.) (quoting Harmelin, ___ U.S. at ___, 111 S.Ct. at 2705). The quoted and cited portions of Harmelin are from Justice Scalia's opinion and relate to the alleged facial invalidity of mandatory sentencing schemes; the Court held that a statute was not unconstitutional on its face merely because the sentencing judge could not consider the facts of the crime. This defendant does not raise that issue. The question here is whether the severity of the punishment, as compared to the facts of the crime, is grossly disproportionate. See Harmelin, ___ U.S. at ___, 111 S.Ct. at 2702.

[7] The dissent misinterprets our use of the word "uncommon." We do not use the word because "we believe" the crime "should not be considered severe." Dissent at 26 (Corcoran, J.). We use it, quoting Justice Corcoran from Bartlett I, because it accurately characterizes the type of behavior under examination and helps to distinguish it from more serious crimes.

[8] We refer again to the trial judge's lack of discretion, not to suggest that the resulting sentence was cruel and unusual because mandatory, but to explain why the trial court did not take the circumstances we have identified as diminishing the gravity of Defendant's crimes into account in sentencing. Indeed, a defendant is not constitutionally entitled to individualized sentencing in noncapital cases. Harmelin, ___ U.S. at ___, 111 S.Ct. at 2701-02. This, however, does not alter the requirement that the sentence actually imposed not be cruel and unusual, and the relevant circumstances must obviously be taken into account in making that determination.

[9] For more recent cases -- cited here as examples and not as precedent, see Rule 28(c), Ariz.R.Civ.App.P., 17B A.R.S. -- see State v. DeCrow, No. 1 CA-CR 90-1231 (Ct. App. Nov. 5, 1991) (twenty-year sentence imposed where defendant "brutally raped his minor stepdaughter, he engaged in sexual conduct with the victim for two years and the victim not only suffered physically but will continue to suffer emotionally as a result of his conduct"); State v. Lyon, Nos. 2 CA-CR 90-0556 and -0557 (consolidated) (Ct. App. Aug. 22, 1991) (twenty-year sentence for sexual conduct

[9] (continued)
with defendant's twelve year-old stepdaughter, sexual indecency with stepson, and child abuse of second stepdaughter); State v. Flores, 2 CA-CR 90-0035 and 91-0245-PR (consolidated) (Ct. App. Aug. 27, 1991) (twenty-year sentence, to be served "day-for-day," for violent rape of a fourteen year-old victim and then assisting an accomplice's rape of the victim).

These cases also illustrate that, contrary to the dissent's claim, see dissent at 30 (Corcoran, J.), our courts have imposed lesser or comparable sentences for more serious crimes.

[10] The state argued in Bartlett I, and argues again now, that Defendant's sentence is similar to that which he could have received in many jurisdictions, and refers this court to a chart summarizing the sentencing provisions in other jurisdictions. We appreciate the difficulty inherent in comparing sentences when the definition of crimes varies so widely among jurisdictions, and recognize the challenge in summarizing this information succinctly yet accurately; nevertheless, we must be able to rely with confidence on a party's assessment of the crimes and the accompanying sentencing schemes relevant to our comparison. The state's chart is of limited utility in this regard. For example, the state's chart includes Utah as a state in which Defendant could have received a similar sentence under the relevant recidivist statutes. Our research, however, suggests that in Utah under the circumstances of this case Defendant could have been sentenced to at most five years in prison and a $5,000 fine on each

10 (continued)
of two counts of unlawful sexual intercourse, a third degree felony, and that the habitual sex offender statutes apply only to offenses committed after a defendant has been convicted of a prior sex offense. See Utah Code Ann. §§ 76-3-203(3) (felony sentencing), 76-3-301 (fines), 76-3-407 and 76-3-408 (habitual sex offenders), 76-5-401 (unlawful sexual intercourse not amounting to rape, 76-5-406 (circumstances rendering consent ineffective for purposes of rape) (1990).

11 See, e.g., State v. Mulalley, 127 Ariz. 92, 96, 618 P.2d 586, 590 (1980).

12 Like the majority, I believe that Justice Scalia and Chief Justice Rehnquist would prefer Justice Kennedy's approach to the dissenters' adherence to Solem.

13 Moreover, if defendant had been "provoked, become violent [and] killed the girls," after having sexual intercourse with 13 (continued)
them, he would have been subject to minimum sentences totalling 90 years' imprisonment without possibility of parole. See A.R.S. § 13-604.01(A), (G) (15 years for first count of sexual misconduct with a minor, 25 years for second count, and 25 years for each count of second degree murder).

14 I am not saying that defendant's crimes were as severe as the crimes committed in these cases. They were not. Nor am I saying that defendant should be sentenced to death, as was each defendant in these cases. He should not. I list these cases only to

14 (continued)
illustrate the threat posed to children who become the victims of sexual misconduct.

15 See Ark. Stat. § 5-14-106 (third degree carnal abuse, a class A misdemeanor); Cal. Penal Code § 261.5, 264 (unlawful sexual intercourse); Ga. Crim. Code § 26-2010 (fornication); Haw. Rev. Stat. § 707-732 (sexual abuse in the third degree); Ill. Crim. Code § 11-4-1 (contributing to the sexual delinquency of a child); Md. Ann. Code § 27-464C (fourth degree sexual offense); Mo. Rev. Stat. § 566.030 (not a felony; age of consent is 14); Pa. Stat. Ann. § 18-3122 (not a felony; age of consent is 14); S.C. Code Ann. § 16-3-655 (not a crime; age of consent is 14); W.Va. Code Ann. § 61-8B-9(a) (sexual abuse in the third degree).

16 Felony penalties for a first offense in other jurisdictions include the following sentencing ranges: Ala. Code § 13A-6-62 (2 to 20 years); Alaska Stat. §§ 11.41.434, 12.55.125 (1 to 10 years); Colo. Rev. Stat. §§ 18-3-4-3, 18-1-105 (2 to 8 years); Conn. Gen. Stat. § 53a-71(a)(1), 53a-35a (1 to 10 years); Del. Code Ann. tit. 11 §§ 773, 4205 (3 to 30 years); Fla. Stat. Ann. §§ 800.04, 775.082 (1 to 15 years); Idaho Code §§ 18-6101, 18-6104 (1 year to life); Ind. Code Ann. §§ 35-42-4-3(c), 35-50-2-6 (2 to 8 years; Iowa Code § 709.4 (1 to 10 years); Kan. Crim. Code Ann. '' 21-3503, 21-4501 (3 to 20 years); Ky. Rev. Stat. Ann. § 510.060 (1 to 5 years); La. Rev. Stat. Ann. § 14:80 (1 to 10 years); Me. Rev. Stat. Ann. tit. 17-A, §§ 254, 1252(2)(D) (1 year); Mass. Gen. Laws Ann. Ch. 265, § 23 (1 year to life); Mich. Comp. Laws § 28.788(4)(a)

16 (continued)
(1 to 15 years); Minn. Stat. Ann. § 609.344 (1)(b)(2) (1 to 15 years); Miss. Code Ann. § 97-5-21 (1 to 10 years); Mont. Code Ann. § 45-5-503(3)(a) (2 to 40 years); Nev. Rev. Stat. §§ 200.364(3), 200.368(1) (1 to 10 years); N.H. Rev. Stat. Ann. §§ 632-A.3, 651:2 (1 to 7 years); N.J. Rev. Stat. §§ 2C:14-2(c)(5), 2C:43-6, a(2) (20 to 10 years); N.M. Stat. Ann. §§ 30-9-13(B), 31-18-15 (1 to 2 years); N.Y. Penal Law §§ 130.25, 70.00, subc. 2(e) (1 to 4 years); N.C. Gen. Stat. §§ 14.202.1, 14-1.1(a)(8) (1 to 10 years); N.D. Cent. Code §§ 12.1-20-03, 12.1-32-01, subd. 3 (1 to 15 years); Ohio Rev. Code Ann. §§ 2907.04, 2929.11(D)(1) (1 to 2 years); Okla. Stat. Ann. §§ 1114(B), 1116 (1 to 15 years); Or. Rev. Stat. §§ 163.355, 161.605 (1 to 5 years); R.I. Gen. Laws §§ 11-37-6, 11-37-7 (1 to 5 years); S.C. Codified Laws § 22-22-1(5) (1 to 15 years); Tenn. Code Ann. § 39-2-605 (1 to 5 years); Tex. Penal Code Ann. § 22.011 (2 to 20 years); Utah Code Ann. §§ 76-5-401(1), 76-3-203(3) (1 to 5 years); Vt. Stat. Ann. tit. 13 § 3252 (1 to 20 years); Wash. Rev. Code §§ 9A.44.079, 9.94A.310, table 1 (1 to 5 years); Wis. Stat. Ann. § 940.225(2)(e) (1 to 10 years); Wyo. Stat. Ann. §§ 6-2-304, 6-2-306(A)(iii) (1 to 5 years); D.C. Code Ann. §§ 22-2801, 24-203 (1 year to life).

17 We do not hold, however, that we would never consider the requirement of consecutive sentences to be a factor in determining proportionality. This is not, for example, a case in which consecutive sentences were imposed on a defendant who engaged in one single course of conduct that resulted in separate repetitive crimes with

17 (continued)
consecutive sentences. In such a case, the consecutive nature of the sentences would perhaps be a factor in deciding proportionality.

APPENDIX B

[Filed November 10, 1988]

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA, Appellee, v. JOSEPH BARTLETT, JR., Appellant.	2 CA-CR 88-0024 Department A MEMORANDUM DECISION Not for Publication Rule 28(a)(2), Rules of Civil Appellate Procedure

APPEAL FROM THE SUPERIOR COURT OF
COCHISE COUNTY

Cause No. CR 87-00020

Honorable Richard A. Winkler, Judge

AFFIRMED

Robert K. Corbin, The Attorney General
by William J. Schafer III and
Vicki Gotkin Adler — Phoenix

Attorneys for Appellee

David P. Flannigan — Bisbee

Attorney for Appellant

L I V E R M O R E, Presiding Judge

In this appeal from a conviction of two counts of sexual conduct with a minor under age 15, the defendant contends that

his confession was involuntary and that his forty-year sentence is unconstitutionally excessive. We disagree and affirm.

The facts surrounding the confession are that the defendant came to the police station with a friend because he had learned that police had made inquiries concerning him. In a short conversation with an officer, defendant admitted the acts leading to his convictions. He then left the station. Because defendant was not in custody, no Miranda warnings were required. State v. Carrillo, 156 Ariz. 125, 750 P.2d 883 (1988). Because no coercive police tactics were used, the admissions were voluntary. State v. Tucker, ___ Ariz. ___, 759 P.2d 579 (1988).

Defendant's argument that the long sentence imposed for sexual conduct with a minor violates the constitutional proscription against cruel and unusual

punishment has been twice rejected by this court. State v. Smith, 156 Ariz. 518, 753 P.2d 1174 (App. 1987); State v. Crego, 154 Ariz. 278, 742 P.2d 289 (App. 1987). We do so again. The remainder of his argument is a heartfelt objection to the consequences of mandatory sentencing on the facts of this case. That is better addressed to the legislature. We do not believe courts have either inherent power or power under A.R.S. § 13-4037 to impose a sentence below the statutory minimum.

Affirmed.

JOSEPH M. LIVERMORE, Presiding Judge

CONCURRING:

JAMES D. HATHAWAY, Judge

LAWRENCE HOWARD, Judge

APPENDIX C

[Filed April 17, 1990]

IN THE SUPREME COURT OF THE STATE
OF ARIZONA

STATE OF ARIZONA	)	Supreme Court
	)	CR-88-0411-PR
Appellee,	)	
	)	Court of Appeals
v.	)	2 CA-CR 88-0024
	)	
JOSEPH BARTLETT, JR.	)	Cochise County
	)	CR-87-00020
Appellant.	)	
	)	O P I N I O N
	)	

Appeal from the Superior Court
of Cochise County

The Honorable Richard A. Winkler, Judge

REMANDED FOR SENTENCING

Memorandum Decision of the Court
of Appeals, Division Two

(filed Nov. 10, 1988)

VACATED IN PART

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C O R C O R A N, Justice

Defendant Joseph Bartlett, Jr. (defendant) petitions for review of the court of appeals decision affirming his convictions for two counts of sexual conduct with a minor under 15 years of age, class 2 felonies and dangerous crimes against children, and the resulting mandatory minimum consecutive sentences totalling 40 years without possibility of early release. We granted review to determine whether these sentences constitute cruel and unusual punishment and ordered the parties to

submit supplemental briefing addressing the following question.

> 1. Under the facts of this case, is the mandatory sentence required by A.R.S. § 13-604.01 so disproportionately severe that it violates those provision of the state and federal constitutions that prohibit cruel and unusual punishment?
>
> 2. If the mandatory sentence prescribed by the applicable statute is unconstitutional as applied to the facts of the crime, what is the proper disposition?

We have jurisdiction pursuant to Ariz. Const. art. 6, § 12-120.24. For the reasons that follow, we hold that the sentences imposed are disproportionate to defendant's crimes under the analysis required by Solem v. Helm, 463 U.S. 277, 103 S. Ct. 3001, 77 L. Ed. 2d 637 (1983), and thus were unconstitutionally imposed. We therefore remand the matter for resentencing.

Factual and Procedural Background

In September 1986, defendant, then 23 years old, was introduced through a mutual friend to a 9th grade student whom we shall call Mary,[1] then 14 1/2 years old. Defendant and Mary saw each other every day in September, October, and November, 1986, dated occasionally, and, according to Mary, considered themselves "boyfriend and girlfriend." In December 1986 Mary ran away from her father's home, where she had been living, and stayed with defendant for 4 days before moving back to her mother's home. Mary

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1. We will use fictitious names for the two teenage girls involved in this case. This is in accordance with our policy of October 24, 1989, in which the Chief Justice advised all appellate judges "to avoid, where possible, referring by name in appellate opinions to individual victims or witnesses who are minors or victims of crimes, where naming them would cause them danger or unnecessary embarrassment. Referring by name should occur only where it is absolutely necessary for clarity.

testified that she and defendant became physically intimate sometime in December 1986, when she voluntarily had sexual intercourse with him. At that time, Mary was two months short of her 15th birthday.

During the fall of 1986, Mary introduced defendant to her 14 1/2-year-old friend, whom we shall call Susan. Defendant lived in the same trailer park as Susan, and Susan often ate lunch with Mary and defendant at the parking lot across the street from the high school that Mary and Susan attended. Susan testified that defendant did not act like he was 23, but was "immature" in that he behaved like and associated with young teenagers. In early December 1986, Susan went to defendant's home and voluntarily had sexual intercourse with him; at the time, Susan was 6 months short of her 15th birthday.

Mary terminated her relationship with defendant around March 1987, when he

admitted to "messing around" with some of her friends. Susan did not continue her sexual relationship with defendant after the initial incident.

In January 1987, police responded to a report of an accidental discharge of a weapon at defendant's trailer park when Susan's mother went looking for defendant after learning of her daughter's sexual encounter with him. The officers confiscated the weapon. The mother filed a complaint, alleging that defendant had forcibly sexually assaulted her 14-year-old daughter. When defendant heard from neighbors that police had inquired about him at the trailer park, he voluntarily went to the police station to find out why they were looking for him. Officer Robert Pearce invited defendant into his back office to talk, and informed defendant that the girl's mother had reported his forcible sexual assault of the 14-year-old. Defendant

denied the mother's accusation and told Officer Pearce that he and Susan had consensual intercourse on one occasion, which he alleged was initiated by Susan when she came to his home. The officer also asked about defendant's relationship with Mary; defendant admitted that he had consensual sexual intercourse with Mary while they were dating. Officer Pearce taped most of defendant's statements but did not arrest defendant after the interview.

Susan later recanted the account of forcible sexual assault that she had told her mother and admitted that she and defendant had consensual sexual intercourse. Based on the evidence that defendant had sexual intercourse with two 14-year-old girls, he was charged with two counts of sexual conduct with a minor under the age of 15 years, class 2 felonies, and dangerous crimes against

children.[2] The state also filed a motion to invoke enhanced punishment by treating a conviction on one count as a prior conviction for purposes of enhancing the other, pursuant to A.R.S. § 13-604(H). See A.R.S. § 13-604.01(A), (H).

Defendant pleaded not guilty[3] but did not appear at trial. Both Mary and Susan testified that their sexual conduct with defendant was consensual and that

---

2 Defendant was also charged with a third count of sexual conduct with a minor aged 15 years, a class 6 felony, involving a third teenager. However, the jury acquitted him of that charge at trial, and the circumstances involving that incident are not relevant to this review.

3 The record indicates that defendant, against his counsel's advice, rejected the state's offer of a stipulated 5-year sentence for all 3 counts if defendant would enter an agreement to plead guilty. Had the offer been accepted, the state apparently would have amended and reduced the charges to make a 5-year sentence statutorily available.

defendant knew each of them was 14 years old. Officer Pearce testified that, during the interview at the police station, defendant had admitted to consensual sexual intercourse with both girls and acknowledged he was aware of their ages. The jury found defendant guilty of two counts of sexual conduct with a minor under 15 years old. The court ordered preparation of a presentence report.

The presentence report indicated that, while on release awaiting trial, defendant voluntarily sought outpatient counseling. His counselor indicated that defendant visited her only once; she "suspected that he feels 'intimidated' by women in his own age group and that this is why he is attracted to younger girls." She also indicated her impression that defendant was "immature for his age."

The report also noted that defendant was married but separated pending a divorce, that his wife was living in Nevada with their 3 small children, and that he had no prior felony convictions. The presentence evaluation included the following analysis and recommendation.

> A reasonably intelligent individual, Bartlett's attraction to young girls may very well be a sign of inferiority around women his own age. Further, the description of his early sexual experiences may indicate a long term deep [seated] problem with women and sex. His justification for his sexual conduct seems to rest with the "loose" character of the female involved, regardless of their age. He tends to relinquish any responsibility on his part by appearing to be a passive participant in all of his sexual encounters.
>
> . . . .
>
> Overall, he appears to be an irresponsible and immature 24 year old man who may continue to present a threat to young girls. His lack of any prior felonies coupled with the seriousness of the offenses, may indicate that the presumptive term in [the Department of Corrections] is appropriate.

At sentencing, the court imposed the minimum mandatory sentence on each count: 15 years for the first count as a nonrepetitive dangerous crime against children, and 25 years on the second count as a repetitive dangerous crime against children, to be served consecutively without any possibility of early release. See generally A.R.S. § 13-604.01. The court expressed its regret at having to impose such a harsh sentence in the following remarks at sentencing:

> THE COURT: Well, I have very little choice in this regard, to put it mildly. The law in Arizona in connection with an offense of this nature is very stringent. As I have reviewed the law and is indicated in the pre-sentence report, the law provides for a very severe presumptive term on each of the counts. The law also provides that each day of the sentence must be served. The law also provides that the sentences must be consecutive, and the law also provides that the subsequent offense is subject to a more severe presumptive term.

> My function, as I view it, is not to second guess the legislature in regard to sentencing, but to follow the law. I took an oath to do that. The law is very severe. . . . The punishment is more severe than in may other types of cases that are very serious offenses. But it is not my function to second guess what the wisdom of the sentence is.
>
> If in fact the sentence is too severe, I think that's for the appellate courts to review. So I really have nothing else to say in regard to sentencing. I'm going to imposed the mitigated term, because I think that it is plenty severe in the case.

The court credited defendant with 88 days of presentence incarceration and ordered him to pay $100 to the victim's compensation fund. Defendant timely appealed. The court of appeals affirmed defendant's convictions and sentences and defendant sought review in this court.

The Court of Appeals Decision

Defendant argued on appeal that his confession was involuntary and that his sentence was cruel and unusual. The court of appeals first concluded that the

confession was voluntary; that holding is not at issue in this review. In the remaining one-paragraph analysis, the court affirmed defendant's sentence:

> Defendant's argument that the long sentence imposed for sexual conduct with a minor violates the constitutional proscription against cruel and unusual punishment has been twice rejected by this court. State v. Smith, 156 Ariz. 518, 753 P.2d 1174 (App. 1987); State v. Crego, 154 Ariz. 278, 742 P.2d 289 (App. 1987). We do so again. The remainder of his argument is a heartfelt objection to the consequences of mandatory sentencing on the facts of this case. That is better addressed to the legislature. We do not believe courts have either inherent power or power under A.R.S. § 13-4037 to impose a sentence below the statutory minimum.

Defendant petitioned this court for review of this decision; we granted review only of the constitutional issue whether defendant's sentences are unconstitutionally cruel and unusual under the particular facts of this case.

Analysis

1. The Statutory Sentencing Scheme

Defendant was charged with violating A.R.S. §§ 13-1405, which provides:

> Sexual conduct with a minor; classifications
>
> A. A person commits sexual conduct with a minor by intentionally or knowingly engaging in sexual intercourse or oral sexual contact with any person who is under eighteen years of age.
>
> B. Sexual conduct with a minor under fifteen years of age is a class 2 felony and is punishable pursuant to section 13-604. Sexual conduct with a minor fifteen years of age or over is a class 6 felony.

The fact that a minor under age 15 consents to sexual intercourse is not a defense under the statute. State v. Fimbres, 130 Ariz. 20, 21, 633 P.2d 427, 430 (App. 1981). The statute differentiates between an offense with a minor between the ages of 15 and 18, and an offense with a minor younger than 15,

in classifying the former as a class 6 felony and the latter as a class 2 felony.

Because both girls engaged in consensual conduct with defendant before their 15th birthdays, however, these offenses were historically class 5 felonies, and the court was required to apply the more stringent sentencing provisions of the dangerous crimes against children act. See A.R.S. § 13-705; 13-604.01. Under that sentencing scheme, the presumptive sentence for the first offense is 15 years. The presumptive term is 20 years, and the maximum term is 25 years. A.R.S. § 13-604.01(D). Defendant would not be eligible for probation or early release until the full sentence is served. A.R.S. § 13-604.01(B). Because the first offense is a "predicate felony" that enhances the sentence for the second offense, see A.R.S. § 13-604.01(K)(2),

the sentencing range for the second offense increases to a mandatory minimum term of 25 years, a presumptive term of 30 years, and a maximum term of 35 years. A.R.S. § 13-604(D)(2)(c). The statute also requires that the second sentence be consecutive to the first. A.R.S. § 13-604.01(J). With no possibility of early release until every day of both sentences has been served. A.R.S. § 13-604.01(F).

The practical effect of these sentencing provisions is that defendant, having received the minimum sentence within the trial court's discretion on both counts, must serve 40 years in prison for these two offenses. He would be 64 years old before he could entertain the possibility of release.

2. Cruel and Unusual Punishment: Bajakajian Analysis

Defendant challenges as cruel and unusual punishment the sentencing

provisions of A.R.S. § 13-604.01 only as applied to the facts of his case. In particular, he challenges the mandatory minimum sentences of 15 years for the first offense and 25 years for the second offense as grossly disproportionate to his crimes involving participation in nonviolent, nonconsensual, incestuous, heterosexual, and consensual sexual intercourse with post-pubescent teenagers. He cannot challenge the facial validity of the statute as applied to other, more egregious crimes against children under different circumstances.

The power to define crimes and to provide for their punishment is one held by the legislature. Rummel v. Estelle, 445 U.S. 263, 284-85, 100 S. Ct. 1133, 1145-46, 63 L. Ed. 2d 382 (198); State v. Bartlett, 171 Ariz. 98, 103, 618 P.2d 592, 597 (1991). As a reviewing court, we must give substantial deference to the broad authority that legislatures necessarily

possess in determining the types and limits of punishments for crimes . . . ." Solem v. Helm, 463 U.S. 277, 290, 103 S. Ct. 3001, 3009, 77 L. Ed. 2d 637 (1983). However, the fact that the legislature enacts a punishment does not conclusively establish its constitutional validity; the eighth amendment prohibition against cruel and unusual punishment is a limit on the legislature's power to mandate penalties. State v. Mulalley, 127 Ariz. 92, 95, 618 P.2d 586, 589 (1980). If we find a mandatory penalty so severe "as to shock the conscience of society," we must find it cruel and unusual. State v. Davis, 108 Ariz. 335, 337, 498 P.2d 202, 204 (1982). We judge whether the moral sense of the community is shocked by whether the punishment is overly severe or disproportionate to the crime. State v. Taylor, 82 Ariz. 289, 294, 312 P.2d 162, 166 (1957). We analyze such

challenges on a case-by-case basis, according to the circumstances of the particular crime, the defendant's personal culpability, and by the perceptions of contemporary society at the time the decision is rendered rather than by our own standards. See generally Mulalley, Taylor.

The United States Supreme Court has enunciated a 3-prong test to determine if a sentence is so disproportionate to the crime as to violate the eighth amendment as cruel and unusual punishment. See Solem v. Helm, 463 U.S. 277, 103 S. Ct. 3001, 77 L. Ed. 2d 637 (1983). The Solem analysis requires us to examine: (1) the gravity of the offense and the harshness of the penalty; (2) a comparison of other sentences imposed in the same jurisdiction for more serious crimes; and (3) a comparison of sentences in other jurisdictions for the same crime. 463 U.S. at 292. This court previously

utilized the same factors, even before Solem v. Helm articulated them, in deciding when a punishment is unconstitutionally cruel and unusual:

> In evaluating the proportionality of a criminal sanction, we will consider not only the nature of the crime and of the offender, . . . but we will compare it with punishments for the same crime in other jurisdictions and for other crimes within our own jurisdiction. Because the "enactments of legislative bodies . . . serve as some index of community standards and values," . . . they help give objective content to the "conscience of society." In comparing the sentence actually imposed with sanctions provided in other jurisdictions, we do not, of course, seek to conform our statutes "to the 'majority rule' or the least common denominator of penalties nationwide." . . . Rather we seek evidence of what sanctions are currently considered acceptable in our society for the crime considered.

Mulalley, 127 Ariz. at 96, 618 P.2d at 590. We previously applied the Solem analysis to uphold sentences imposed under A.R.S. § 13-604.01 for other dangerous crimes against children. See

State v. Jonas, No. CR-89-0021-PR (Ariz. filed April , 1990); State v. Taylor, 160 Ariz. 415, 422-23, 773 P.2d 974, 981-82 (1989). Our court of appeals has also applied the Solem factors to decide eighth amendment attacks against sentences for crimes against children. See State v. Byrd, 160 Ariz. 282, 284, 772 P.2d 1135, 1137 (App. 1988); State v. Smith, 156 Ariz. 518, 525-26, 753 P.2d 1174, 1181-82 (App. 1987); State v. Crego, 154 Ariz. 278, 280, 742 P.2d 289, 291 (App. 1987). We now determine whether the eighth amendment is violated by applying the mandatory sentencing provisions of A.R.S. § 13-604.01 to this particular defendant under the specific facts of this case.

A. Gravity of the Offense and Harshness of the Penalty

In determining the gravity of the offense, we must examine the type of harm threatened or inflicted and the level of

defendant's culpability, measured by the seriousness of the crime, against whom it was committed, and its level of violence. Solem, 463 U.S. at 292-93; Jonas, slip. op at 12.

In enacting the harsh penalties of the dangerous crimes against children act, the legislature determined the crimes against children are among the most serious crimes in our society. By providing lesser penalties for those crimes against children who have reached the age of 15, the legislature also determined that crimes against children under age 15 are more serious crimes than those against older children. This "line-drawing" functioning is properly the legislature's. See Jonas, slip op. at 16. Additionally, by not providing the defense of consent to sexual conduct with a child younger than 18, the legislature declared that, in its judgment, children below the age of

majority are incapable of making a mature decision to engage in sexual conduct. See Fristoe, 135 Ariz. at 30, 658 P.2d at 830 ("When a person has participated in sexual conduct with a minor, he is equally guilty of the crime whether he forced himself upon the minor or whether he succeeds in persuading the minor to allow the sexual act to take place"). But see State v. Puig, 154 Ariz. 624, 628-29, 744 P.2d 725, 729-30 (App. 1987) (although consent is not at issue if minor is under 15, where minor is older than 15 and defendant reasonably believes the minor to be over 18, consent will be a defense to a sexual abuse charge).

Although the minor's consent will not decriminalize the sexual conduct, that consent is relevant to our inquiry into the gravity of the offense. In this case, both minors were close to the maturity line that the legislature has drawn for less serious offense.

According to their testimonies, both were willing participants in defendant's conduct. Defendant used no violent force or threats against them. Neither girl was physically injured or testified to any emotional trauma. Under these circumstances, we must certainly consider these offenses less grave than the others punishable under the same statutory scheme: second degree murder, sexual assault, taking a child for the purposes of prostitution, child prostitution, involving or using a minor in drug offenses, aggravated assault, molestation of a child, sexual exploitation of a minor, child abuse, or kidnapping. See generally A.R.S. § 13-604.01.

Additionally, we must consider the minor's proximities to their 15th birthdays. Although the legislature may be forced to draw a "bright line" at a particular age (in this case, at the age of 15) in distinguishing between class 6

and class 2 sexual conduct felonies, a reviewing court can look at a more graduated line, depending on the nature of the individual offense, in deciding the proportionality of the punishment to the crime. Thus, although the fact that both consenting girls were close to their 15th birthdays cannot be used to reduce the crimes from class 2 felonies to class 6 felonies, the punishment imposed for those harsher class 2 felonies must be proportionate to these individual offenses. And although the legislature has determined that a minor's "consent" to sexual conduct does not excuse its commission, certainly the punishment for consensual sexual conduct with a minor of 14 1/2 years old should be closer to the punishment for sexual conduct with a 15-year-old than to punishment for sexual conduct with a 2-year-old. We thus examine what punishment defendant would have received if the minors were 15.

If Mary and Susan had been two months and six months older, respectively, defendant would have faced sentencing for two counts of a class 6 felony for sexual conduct with a minor 15 years of age. The range of sentencing for the first offense would have been a minimum term of 9 months, a presumptive term of 1.5 years, and a maximum term of 1.875 years. See A.R.S. §§ 13-701(C)(5), -702(A). The trial court would have had discretion to place defendant on probation and to designate the offense as a class 1 misdemeanor upon successful completion of that probation. See A.R.S. § 13-0702(H). If imprisoned, defendant would have been eligible for early release after one-half the sentence had been served. The range of sentencing for the second offense, as a repetitive felony under A.R.S. § 13-604(H), would have been a minimum term of 1.5 years, a

presumptive term of 2.25 years, and a maximum term of 3 years. See A.R.S. §§ 13-604(A), -702(H). Defendant would not have been eligible for probation for the second offense, but would have been eligible for early release after one-half the sentence had been served. See A.R.S. § 13-604(A). Defendant's terms could have been imposed either consecutively or concurrently, within the trial court's discretion. See A.R.S. § 13-708. The sentences defendant actually received were significantly more harsh.

As to defendant's personal culpability, the record indicates that he was an "immature" young man who associated with a younger peer group because of his emotional insecurities, which included a pending divorce after marriage at a young age. He had no prior felony record and no history of assaulting young children. No evidence was presented that he

intended to harm these girls, either physically or emotionally. But for his age of 22, this situation would be similar to others in which we have recognized a defendant may have less culpability in a crime resulting from a teenage romance;

> We do not for a moment undertake to minimize the wrong done to the minor child or to in any degree condone it. But we feel that the wrong may be ascribed more to the follies of youth in this era of confusion and frustration than to a wicked and depraved heart.

State v. Telavera, 76 Ariz. 183, 187, 261 P.2d 997, 1000 (1953) (Phelps, J.).

We must also recognize that sexual conduct among post-pubescent teenagers is not uncommon. Other courts have taken such notice:

> It is a fact that many young people, male and female, engage in sexual intercourse. In 1976, 2.7% of all 16-year-olds in the United States, and 6.4% of all 17-year-olds, had borne at least one child. U.S. National Center for Health Statistics, Vital Statistics of the United States,

Table 1-17 (1978). About half of these children were illegitimate. Id., Table 1-32. These statistics, including those on abortions (311 reported for every 1,000 live births, U.S. Department of Commerce, Bureau of the Census, Statistical Abstract of the United States 59 (1977)), indicate that a great number of unmarried 15- and 16-year-olds have engaged in sexual intercourse resulting in pregnancy and suggest that a greater number have done so without pregnancy.

> Without applauding the sexual permissiveness of the times, we can only note that in the social context of the times this type of offense between young people is committed many times without criminal prosecution and that, in ordinary sentencing practice, is not regarded as so serious as to require imprisonment.

State v. Sepulvado, 367 So.2d 762, 771 (La. 1979).

Measuring the gravity of the offenses in this context, we must compare the harshness of the penalty. The legislature has imposed mandatory minimum consecutive sentences of 15 and 25 years for the first and second acts of consensual sexual conduct with a minor,

with no possibility of early release. The trial court thus had no discretion to reduce the penalty according to the individual circumstances that indicated a less serious offense or a less culpable defendant. Defendant, with no prior felony history, has received a 40-year penalty for sexual conduct with two consenting post-pubescent teenagers. The broad application of the statute to encompass this situation results in a penalty grossly out of proportion to the severity of the crime. Although such a harsh penalty may be justified in the context of other, more heinous crimes included within the sentencing scheme, it is not justified under the specific circumstances of this case.

B. Sentences Imposed for Other Crimes in Arizona

We next examine the sentence imposed in Arizona on defendants who commit crimes more serious than this defendant's.

Solem, 463 U.S. at 292; Jonas, slip op. at 19. We have previously disapproved the practice of comparing only those crimes encompassed within the challenged sentencing statute to conclude that the punishment is proportionate because all crimes within the statutory scheme receive the same penalties. See Jonas, slip op. at 19-20, disapproving the analysis in State v. Smith, 156 Ariz. at 526, 753 P.2d at 1182, and State v. Crego, 154 Ariz. at 280, 742 P.2d at 291.

However, a comparison of the other crimes punishable under the same mandatory sentencing provisions of A.R.S. § 13-604.01 is helpful in this case to show that more serious offenses do not receive any greater punishment. For example, second degree murder, forcible sexual assault, taking a child for the purposes of prostitution, or involving a child in a drug offense are all

considered first degree crimes against children, subject to the same mandatory minimum sentences of 15 and 25 years that defendant received. A.R.S. § 13-604.01(A), (D). More potentially serious crimes than those committed here, such as aggravated assault, child molestation, child abuse, or kidnapping, are subject to a lesser minimum sentence of 12 years for the first offense and 23 years for the second offense. See A.R.S. § 13-604.01(B), (D).

Other more serious crimes that do not involve children similarly receive lesser penalties than those mandated in this case. Class 2 felonies not involving a dangerous weapon or threatened physical injury are punishable for a first offense with a minimum term of 5.25 years, a presumptive term of 7 years, and a maximum of 14 years, with early release potentially available after only half the sentence has been served. A.R.S.

§§ 13-701, -702. Such first-time offenders are eligible for probation, or, if imprisoned, can earn early release credits of 1 day for each 2 days served. A second offense carried a minimum term of 7 years, a presumptive term of 10.5 years, and a maximum of 21 years, with early release potentially available after two-thirds of the sentence has been served. A.R.S. §§ 13-701, -702, -604(B). The first and second sentences are presumed to run consecutively but the trial court has discretion to make them concurrent by stating its reasons on the record. A.R.S. § 13-708. Included within this scheme of punishment for class 2 felonies are the following crimes, all potentially more serious than the offenses committed by this defendant: kidnapping, A.R.S. § 13-1304; sexual assault of an adult, A.R.S. § 13-1406; first degree burglary of a residential structure, A.R.S. § 13-1508;

and arson of an occupied structure, A.R.S. § 13-1704. Additionally, manslaughter, a class 3 felony, A.R.S. § 13-1103, is punishable with a minimum sentence of 3.75 years, a presumptive term of 5 years, and a maximum term of 10 years. A.R.S. §§ 13-701(C)(2), -702(B).

We also compare the circumstances under which other defendants have been subjected to the same mandatory sentencing scheme. In State v. Taylor, we upheld an aggregate prison term of 2,975 years for 85 counts of dangerous crimes against children. 160 Ariz. 415, 773 P.2d 974 (1989) In that case, the defendant performed and photographed various sexual acts with children aged from 18 months to 8 years old, and many other unidentified small children. He also had a prior criminal history of sex crimes with young children in two other states. We recognized the "irreparable

harm which he has caused to the normal development of numerous children," and his inability "to control his proclivity for sexual conduct with children" as important factors justifying the harshness of the sentence. Taylor, 160 Ariz. at 423, 773 P.2d at 982. In State v. Crego, the court of appeals upheld two consecutive 20-year prison terms for a defendant who molested 3 different victims under age 15 a few months after he had been released from prison for a similar offense, and while he was on parole. 154 Ariz. at 279, 742 P.2d at 290. In State v. Smith, the court of appeals also upheld a mandatory prison sentence of 91 years for a defendant who repeatedly molested a 10-year-old boy and photographed the numerous incidents on approximately 60 occasions. 156 Ariz. at 520, 753 P.2d at 1176. Defendant also points out other cases in which harsh sentencing

provisions were appropriately applied in situations involving repeated and cruel sexual offenses against small children. See, e.g., State v. Cummings, 148 Ariz. 588, 716 P.2d 45 (App. 1985) (defendant, a scoutmaster, performed multiple acts of oral and anal sex on 12- to 13-year-old male victims; was sentenced to 5 concurrent prison terms ranging from 7 to 15.75 years); State v. O'Neill, 117 Ariz. 343, 572 P.2d 1181 (1977) (defendant, while baby-sitting, molested a two-year-old infant, resulting in a tear between her vagina and rectum; was sentenced to 20 years to life). These and other cases stand in stark contrast to the circumstances under which this defendant was sentenced in this case.

We conclude that a comparison of the punishments imposed for other crimes in Arizona reveals the disproportion with which defendant was sentenced under these factual circumstances.

C. Sentences Imposed for the Same Crime in Other States

We also examine the punishment imposed for the same crime in other jurisdictions. Solem, 463 U.S. at 292. This comparison is difficult because the offenses defendant committed are chargeable as a broad variety of crimes with varying punishments. However, we have attempted to compare penalties for the crimes closest to those committed here: consensual, nonincestuous, heterosexual intercourse with a 14-year-old.

Additionally, we compare each of defendant's sentences individually, keeping in mind that the 15-year-sentence was imposed for a first offense, and that the 25-year-sentence was imposed for a second offense. We also consider only those sentences imposed for a defendant with no prior felony convictions, other than the first offense used as an

enhancement factor for the second offense. Our focus is necessarily on the mandatory minimum sentences imposed in other jurisdictions, because that is what defendant received here. We do not consider significant the state's argument that defendant could have received maximum sentences in other jurisdictions greater than the minimums imposed in this case, because the record clearly indicates that the trial court did not find aggravating factors justifying maximum sentences under these circumstances.

(1) 15-year Sentence for First Offense

In 10 jurisdictions, defendant's offenses would either not be a crime or would be punishable only as a misdemeanor with a sentence of less than one year and/or a fine.[4] For a first felony

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[4] See Ark. Stat. § 5-14-106 (third degree carnal abuse, a class A

offense in the remaining jurisdictions, defendant would have faced a minimum penality of one, two, or three years,[5]

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[4] (continued)
misdemeanor); Cal. Penal Code§ 261.5, 264 (unlawful sexual intercourse); Ga. Crim. Code § 26-2010 (fornication); Haw. Rev. Stat. § 707-732 (sexual abuse in the third degree); Ill. Crim. Code § 11-4.1 (contributing to the sexual delinquency of a child); Md. Ann. Code § 27-464(C) (fourth degree sexual offense); Mo. Rev. Stat. § 566.030 (not a felony; age of consent is 14); Pa. Stat. Ann. § 18-3122 (not a felony; age of consent is 14); S.C. Code Ann. § 16-3-655 (not a crime; age of consent is 14); W. Va. Code Ann. § 61-8B-9(a) (sexual abuse in the third degree).

[5] Felony penalties for a first offense in other jurisdictions include the following sentencing ranges: Ala. Code § 13A-6-62 (2 to 20 years); Alaska Stat. §§ 11.41.434, 12.55.125 (1 to 10 years); Colo. Rev. Stat. §§ 18-3-403, 18-1-105 (2 to 8 years); Conn. Gen. Stat. § 53a-71(1), 53a-35a (1 to 10 years); Del. Code. Ann. tit. 11 §§ 773, 4205 (3 to 30 years); Fla. Stat. Ann. §§ 800.04, 775.082 (1 to 15 years); Idaho Code §§ 18-6101, 18-6104 (1 year to life); Ind. Code. Ann. §§ 35-42-4-3(c), 35-50-2-6 (2 to 8 years); Iowa Code § 709.4 (1 to 10 years); Kan. Crim. Code Ann. §§ 21-3503, 21-4501 (3 to 20 years); Ky. Rev. Stat. Ann. § 510.060 (1 to 5 years); La. Rev. Stat. Ann. § 14:80 (1 to 10 years); Me. Rev. Stat. Ann. tit.

with probation often available. Thus, our statute is unique among all

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[5] (continued)
17-A, §§ 254, 1252(b) (1 year); Mass. Gen. Laws Ann. Ch. 265, § 23 (1 year to life); Mich. Comp. Laws § 28.788(4)(a) (1 to 15 years); Minn. Stat. Ann. § 609.344(1)(b)(2) (1 to 15 years); Miss. Code Ann. § 97-5-21 (1 to 10 years); Mont. Code Ann. § 45-5-503(3)(a) (2 to 40 years); Neb. Rev. Stat. § 28-319 ~~(1 to~~ 50 years); Nev. Rev. Stat. §§ 200.364(3), 200.368(1) (1 to 10 years); N.H. Rev. Stat. Ann. §§ 632-A:3, 651:2 (1 to 7 years); N.J. Rev. Stat. Ann. §§ 2C:14-2(c)(5), 2C:43--6.a, b(2) (2 to 10 years); N.M. Stat. Ann. §§ 30-9-13(B), 31-18-15 (1 to 2 years); N.Y. Penal Law §§ 130.25, 70.00(e) (1 to 4 years); N.C. Gen. Stat. §§ 14.202.1, 14-1.1(8) (1 to 10 years); N.D. Cent. Code §§ 12.1-20-03, 12.1-32-01.3 (1 to 15 years); Ohio Rev. Code Ann. §§ 2907.04, 2929(A)(3)(a) (1 to 2 years); Okla. Stat. Ann. §§ 1114(B), 1116 (1 to 15 years); Or. Rev. Stat. §§ 163.355, 161.605 (1 to 5 years); R.I. Gen. Laws §§ 11-37-6, 11-37-7 (1 to 5 years); S.D. Codified Laws § 22-22-1(5) (1 to 15 years); Tenn. Code Ann. § 39-2-605 (1 to 5 years); Tex. Penal Code Ann. § 22.011 (2 to 20 years); Utah Code Ann. §§ 76-5-401(1), 76-3-203(3) (1 to 5 years); Vt. Stat. Ann. tit. 13 § 3252 (1 to 20 years); Wash. Rev. Code §§ 9A.44.079, 9.94A.310, table 1 (1 to 5 years); Wis. Stat. Ann. § 940.225(2)(3) (1 to 10 years); Wyo. Stat. §§ 6-2-304, 6-2-306(iii) (1 to 5 years); D.C. Code Ann. §§ 22-2801, 24-203 (1 year to life).

jurisdictions in that it imposes a minim mandatory term of 15 years, which is 5 times higher than that imposed in any other jurisdiction. In all jurisdictions but Arizona, the sentencing judge has a wide range of discretion in imposing a sentence at the bottom of the statutory range that fits the individual circumstances of the crime. Although the maximum allowable sentence in some jurisdictions would have fallen within the range of sentencing provided for a first offender under A.R.S. § 13-604.01(A), in no jurisdiction would the sentencing judge be required to impose a sentence of more than 3 years for the identical offense. Thus our legislature has mandated a penalty potentially disproportionate to an individual criminal act or defendant. See J. Howe, Thoughts on Mandatory Sentencing, Ariz. Bar J. June-July 1985, at 24-25.

Such potential disproportionality is not enough to allow us to find defendant's sentences cruel and unusual. See State v. Taylor, 160 Ariz. 415, 773 P.2d 974 (1989) ("Although on the national spectrum Arizona deals with crimes against children more severely than many other states, '[t]he Eighth Amendment is not violated every time a state reaches a conclusion different from a majority of its sisters over how to best administer its criminal laws.' Spaziano v. Florida, 468 U.S. 447, 464, 104 S. Ct. 3154, 3164, 82 L. Ed. 2d 340, 355 (1984)"). Such potential differences in sentencing are "a mark of federalism, not unconstitutionality." State v. Bishop, 717 P.2d 261, 272 (Utah 1986).

In this case, however, the potential disproportion between the sentences defendant received and those sentences actually imposed on other similarly situated defendants in other

jurisdictions is actual. Defendant has supplied us with a myriad of examples in the published case law of other jurisdictions. A few representative citations illustrate his point: Diefenderfer v. State, 745 P.2d 556 (Wyo. 1987) (defendant pleaded guilty to third degree sexual assault of a girl under 14; the execution of his sentence of 3 to 5 years suspended and 4 years probation imposed); State v. DeJesus, 10 Conn. App. 591, 524 A.2d 1156 (1987) (defendant pleaded guilty to second degree sexual assault of a 14-year-old; sentence of 5 years upheld); State v. La Borde, 234 La. 28, 99 So.2d 11 (1958) (defendant convicted of carnal knowledge of 14-year-old; sentenced to one year, 9 months); State v. Smart, 247 La. 174, 170 So.2d 365 (1965) (defendant convicted of carnal knowledge of a 13-year old; sentenced to 3 years); State v. Rodriguez, 179 N.J. Super. 129, 430 A.2d

957 (1981) (defendant convicted of sexual assault of a 13-year old; sentenced to 4 years); State v. Newell, 348 S.E.2d 158 (N.C. 1986) (defendant convicted of taking indecent liberties with a consenting child between 13 and 16; sentenced to 3 years); State v. Hartman, 145 Wis.2d 1, 426 N.W.2d 320 (1988) (defendant convicted of statutory rape of a 14-year old; sentenced to a term of not more than 3 years, but suspended and defendant placed on probation with 6 months in county jail work release program). Additionally, defendant's appellate counsel has avowed to the court that he "has diligently searched two centuries of case law of each of our 50 sister states. This required the review of just over 2,600 cases. Not one case was found where a similarly situated defendant received an aggravated sentence remotely comparable to that imposed as a mandatory minimum upon Mr. Bartlett."

Given this authority, we conclude that the mandatory minimum sentence imposed on defendant for his first offense was disproportionate to sentences received by similarly situated defendants in other jurisdictions.

(2) 25-year sentence for second offense

A comparison of the 25-year mandatory minimum sentence defendant received for the second offense with those imposed in other jurisdictions is complicated by the enhancement of defendant's second sentence because the first count was treated as a prior predicate felony. Most jurisdictions punish repeat offenders more stringently, and enhancement of penalties on the basis of prior offenses has been consistently upheld against eighth amendment attacks. See, e.g., Rummel, 445 U.S. at 276; Cocio v. Bramlett, 872 F.2d 889, 893 (9th Cir. 1989). However, we are mindful that the legislature, in requiring a 25-year

minimum sentence for a second offense, implicitly assumed that it was enhancing a constitutionally proportionate minimum sentence of 15 years for a first offense. We have already found the minimum sentence for the first offense to be disproportionate to the facts of this case. Additionally, the "prior" felony in this case was one for which defendant was simultaneously tried and sentenced with the second offense, a factor not existing in other jurisdictions. See A.R.S. § 13-604(H).

Also complicating our analysis is the mandatory consecutive nature of the two sentences, along with the absence of the availability of parole. We have previously refused to find the consecutive nature of two sentences for two separate crimes to be a factor that would render the second sentence disproportionate. Jonas, slip op. at 18. We thus do not consider that

factor here.[6] Nonavailability of parole, however, is a factor in determining proportionality, although the absence of parole, in itself, does not make a sentence disproportionate. Solem, 463 U.S. at 297 and n.24; Jonas, slip op. at 18. In this case, the absence of parole availability requires us to consider that defendant will serve the entire 25-year sentence for the second offense.

Despite these difficulties, a comparison of what penalties defendant would face for a second offense in other jurisdictions, although not as clear as the comparison for a first offense,

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[6] We do not hold, however, that we would never consider the requirement of consecutive sentences to be a factor in determining proportionality. This is not, for example, a case in which consecutive sentences were imposed on a defendant who engaged in one single course of conduct that resulted in a separate repetitive crimes with consecutive sentences. In such a case, the consecutive nature of the sentences would perhaps be a factor in deciding proportionality.

compels the conclusion that defendant would be subject to a much lighter minimum mandatory sentence for his second offense in all but one state.

In Nebraska, defendant would be subject to a statutory range of 25 to 50 years for a second conviction of sexual assault involving a consenting child less than 16 years old, and would not be eligible for parole. Neb. Rev. Stat. § 28-319(1)(c), (3). However, as the United States Supreme Court noted in Solem v. Helm, a finding that a defendant could have received an identically harsh sentence in one other state is also a clear indication that he "could not have received such a severe sentence in 48 of the 50 states." 463 U.S. at 299 (emphasis added). Furthermore, we have not been advised by the state of any defendant charged in Nebraska with offenses similar to Bartlett's actually receiving such a harsh sentence. Rather,

the published cases that we have found challenging the mandatory Nebraska sentence for a second offense have involved more heinous offense, including forcible rape with serious physical injuries to the victim. See, e.g., State v. Brand, 219 Neb. 402, 363 N.W.2d 516 (1985) (defendant received 35-year sentence for his second conviction of first-degree sexual assault involving the use of force; sentence found not disproportionate to crime). Under these circumstances, we cannot find the 25-year mandatory minimum sentence for defendant's second offense to be proportionate merely on the basis of the Nebraska statue.

Except for Nebraska, no other jurisdiction imposes a mandatory minimum sentence of more than 10 years for a second offense similar to defendant's. In no jurisdiction did we find the particularly harsh combination of provisions

present here, including both mandatory consecutive sentencing and nonavailability of parole. We must conclude, therefore, that the 25-year mandatory minimum imposed for defendant's second offense is also disproportionate to the sentences imposed on similarly situated defendants in other jurisdictions.

Based on the above analysis, we hold that defendant's sentence of 15 years for the first offense and 25 years for the second offense are disproportionate to the crimes he committed under the specific facts of this case, and thus violate the eighth amendment proscription against cruel and unusual punishment. This is a narrow holding limited to the facts and circumstances of this case. The Supreme Court has said that successful challenges to the proportionality of particular sentences are "exceedingly rare." Solem, 463 U.S. at 289-90. This is such a rare case.

3. Cruel and Unusual Punishment under the Arizona Constitution

Although this court requested additional briefing on whether defendant's sentence violated either the federal or state constitutional provisions prohibiting cruel and unusual punishment, neither party analyzed the state constitutional provision separately from the federal grounds.

Article 2, § 15 of the Arizona Constitution is identically worded to its federal counterpart prohibiting cruel and unusual punishment. The framers of the Arizona Constitution, "in a rare case of using the federal Constitution as a model," adopted the federal wording "cruel and unusual punishment" over the committee's proposed wording that neither "cruel nor unusual punishment" should be permitted. J. Leshy, The Making of the Arizona Constitution, 20 Ariz. St. L.J. 1, 85 and n.524 (1988), citing Journal of

the [Arizona] Constitutional Convention 463 (Con. P. Cronin Comp. 1925). This deliberate adoption of the federal wording expressed the framers' intent to give legislators wide discretion in imposing methods of capital punishment. See S. Feldman & D. Abney, The Double Security of Federalism: Protecting Individual Liberty Under the Arizona Constitution, 20 Ariz. St. L.J. 115, 122 (1988).

Here, where identically worded federal and state constitutional provisions are alleged to have been violated, when the parties do not argue that the state constitution provides greater protection than does the federal analog, and when we have already found a violation of the federal counterpart, we need not address whether defendant's sentences would have violated the Arizona constitution had they not violated the eighth amendment.

Having concluded that the sentences imposed in this case violate the eighth amendment prohibition against cruel and unusual punishment, we do not address whether they violate art. 2, § 15 of the Arizona Constitution.

Disposition

In his petition for review, defendant argues that we should reduce his sentence to one more proportionate to his crime pursuant to our authority to reduce excessive sentences under A.R.S. § 13-4037(B), which provides:

> If, in its opinion, the conviction is proper but the punishment imposed is greater than under the circumstances of the case ought to be inflicted . . . the supreme court shall impose any legal sentence, not more severe than that originally imposed, which in its opinion is proper. . . .

The ability to impose "any legal sentence" necessarily implies that we are limited to reducing an excessive sentence to one within the statutory range enacted by the legislature, assuming that range

is constitutional. See Wahl v. State, 39 Ariz. 62, 3 P.2d 1052 (1931); State v. Gourdin, 156 Ariz. 337, 751 P.2d 997 (App. 1988) (a sentence not authorized by law is illegal). Indeed in prior cases in which we have reduced an excessive sentence under authority of A.R.S. § 13-4037 or its predecessor, A.R.S. § 13-1717, we have imposed a sentence within the range of sentencing provided by the legislature. See e.g., State v. Telavera, 76 Ariz. 183, 261 P.2d 997 (1953) (excessive sentence of 10 to 20 years reduced to 7 to 10 years); State v. Seelen, 107 Ariz. 256, 485 P.2d 826 (1971); State v. Flores, 108 Ariz. 231, 495 P.2d 461 (1972); State v. Waldrip, 111 Ariz. 516, 533 P.2d 1151 (1975).

In this case, however, we hold that the statutory range of sentencing under A.R.S. § 13-604.01 cannot constitutionally be applied to defendant's crimes under the facts and circumstances of this

case. We therefore have no available "legal" sentence within the range of A.R.S. § 13-604.01 to impose on defendant.

The state argues that if we find defendant's sentences unconstitutionally cruel and unusual, "appellant must be set free, as he has committed a crime for which there would be no punishment." The state bases its position on the assumption that the underlying substantive offense of sexual conduct with a minor, prohibited by A.R.S. § 13-1405, is so "inextricably united" with the sentencing provisions of A.R.S. § 13-604.01, that sentencing defendant under any other provision of the law would "undermine the intent of the entire statutory scheme." We cannot agree with this proposition.

We do not invalidate defendant's convictions for two counts of sexual conduct with a minor under age 15. Such offenses have been validly designated class 2 felonies by the legislature.

Neither do we hold the sentencing provisions of A.R.S. § 13-604.01 unconstitutional as applied to other defendants under different circumstances. We merely hold that the sentencing provisions of A.R.S. § 13-604.01, which are more stringent than those applied to other class 2 felons, cannot be applied constitutionally to this defendant under these facts and circumstances. The result is to bar application of those provisions to this case, leaving defendant to be sentenced the same as any other class 2 felon to whom the provisions of A.R.S. § 13-604.01 would not apply. Thus, under the remaining statutory range provided for class 2 felonies in A.R.S. §§ 13-701 and -702, defendant could be sentenced within the range that would include, for the first offense, a minimum term of 5.25 years, a presumptive term of 7 years, and a maximum term of 14 years,

of which he would have to serve a least one-half before any possible release. As a first-time nondangerous offender, he would be eligible for probation. For the second offense, defendant's sentence could be enhanced by the first offense, see A.R.S. § 13-604(H), within the range that would include a minimum term of 7 years, a presumptive term of 10.5 years and a maximum term of 21 years. See A.R.S. § 13-604(B). Defendant would not be eligible for probation for the second offense, and would have to serve at least two-thirds of any sentence imposed before release. A.R.S. § 13-604(B). Defendant's sentences would run consecutively unless the trial court stated on the record its reasons for imposing concurrent sentences. A.R.S. § 13-708.

Such a sentencing scheme can be applied validly to this defendant as a class 2 felon. This wide discretionary range of sentencing will enable the trial court to

proportionately tailor the harshness of the penalty to the severity of the crimes. Because we cannot discern from the record before us what sentences the trial court would have imposed had it not felt bound by the mandatory provisions of A.R.S. § 13-604.01, we remand this matter to the trial court for resentencing in accordance with this opinion. We also vacate that portion of the court of appeals memorandum decision that is inconsistent with this opinion.

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Robert J. Corcoran, Justice

CONCURRING:

_____

Frank X. Gordon, Jr. Chief Justice

_____

Stanley G. Feldman, Vice Chief Justice

_____

James Duke Cameron, Justice

_____

James Moeller, Justice

APPENDIX D

Supreme Court

STATE OF ARIZONA
201 WEST WING STATE CAPITOL
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TELEPHONE: (602) 542-4536

NOEL K. DESSAINT
CLERK OF COURT

KATHLEEN E. KEMPLEY
CHIEF DEPUTY CLERK

June 20, 1990

RE: **STATE OF ARIZONA vs. JOSEPH BARTLETT, JR.**
Supreme Court No. CR-88-0411-PR
Court of Appeals No. 2 CA-CR 88-0024
Cochise County No. CR 87-00020

GREETINGS:

The following action was taken by the Supreme Court of the State of Arizona on June 19, 1990, in regard to the above-referenced cause:

ORDERED: Motion for Stay Mandate = DENIED.

Justice Corcoran voting to grant.

FURTHER ORDERED: Motion for Reconsideration = DENIED.

NOEL K. DESSAINT, Clerk

TO:

Hon. Robert K. Corbin, Attorney General, 1275 West Washington, Phoenix, AZ 85007 - Attn: Jessica Gifford Funkhouser, Esq. and Vicki Gotkin Adler, Esq.

David P. Flannigan, Esq., P.O. Box 4340, Bisbee, AZ 85603

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Stephen M. Dichter, Esq., Harrison, Harper, Christian & Dichter, P.C., 340 E. Palm Lane, Suite 275, Phoenix, AZ 85004

llk

APPENDIX E

Supreme Court of the United States

No. 90-473

Arizona,

Petitioner,

v.

Joseph Bartlett, Jr.

ON WRIT OF CERTIORARI to the Supreme Court of Arizona.

THIS CAUSE having been submitted on the petition for writ of certiorari and response thereto,

ON CONSIDERATION WHEREOF, it is ordered and adjudged by this Court that the judgment of the above court in this cause is vacated, and that this cause is remanded to the Supreme Court of Arizona for further consideration in light of **Harmelin v. Michigan**, 501 U.S. ___ (1991).

June 28, 1991

APPENDIX F

Supreme Court

STATE OF ARIZONA
402 ARIZONA STATE COURTS BUILDING
1501 WEST WASHINGTON
PHOENIX, ARIZONA 85007-3329

TELEPHONE: (602) 542-9396

NOEL K. DESSAINT
CLERK OF COURT

KATHLEEN E. KEMPLEY
CHIEF DEPUTY CLERK

June 17, 1992

RE: STATE OF ARIZONA vs. JOSEPH BARTLETT, JR.

Supreme Court No. CR-88-0411-PR

Court of Appeals No. 2 CA-CR 88-0024

Cochise County No. CR 87-00020

GREETINGS:

The following action was taken by the Supreme Court of the State of Arizona on June 16, 1992, in regard to the above-referenced cause:

ORDERED: Motion for Reconsideration = DENIED.

Justices Zlaket and Martone, and retired Justices Cameron and Gordon did not participate in the determination of this

matter.

Mandate enclosed.

NOEL K. DESSAINT, Clerk

TO:

Hon. Grant Woods, Attorney General, 1275 West Washington, Phoenix, AZ 85007 - ATTN: Paul J. McMurdie, Esq.

James L. Conlogue, Esq., Hicks & Conlogue, P.C., P.O. Box 4550, Bisbee, AZ 85603

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APPENDIX G

13-604.01. Dangerous crimes against children; sentences; definitions

A. Except as otherwise provided in this section, a person who is at least eighteen years of age or who has been tried as an adult and who stands convicted of a dangerous crime against children in the first degree involving second degree murder, sexual assault, taking a child for the purpose of prostitution, child prostitution or sexual conduct with a minor or involving or using minors in drug offenses shall be sentenced to a presumptive term of imprisonment for twenty years. If the convicted person has been previously convicted of one predicate felony the person shall be sentenced to a presumptive term of imprisonment for thirty years.

B. Except as otherwise provided in this section, a person who is at least eighteen years of age or who has been

tried as an adult and who stands convicted of a dangerous crimes against children in the first degree involving aggravated assault, molestation of a child, commercial sexual exploitation of a minor, sexual exploitation of a minor, child abuse or kidnapping shall be sentenced to a presumptive term of imprisonment for seventeen years. If the convicted person has been previously convicted of one predicate felony the person shall be sentenced to a presumptive term of imprisonment for twenty-eight years.

C. Except as otherwise provided in this section, a person who is at least eighteen years of age or who has been tried as an adult and who stands convcited of a dangerous crime against children in the first degree involving sexual abuse shall be sentenced to a presumptive term of imprisonment for ten years. If the convicted person has been

previously convicted of one predicate felony the person shall be sentenced to a presumptive term of imprisonment for fifteen years.

D. The presumptive sentences prescribed in subsections A, B and C of this section may be increased or decreased by up to five years pursuant to the provisions of § 13-702, subsections C, D and E.

E. A person sentenced for a dangerous crime against children in the first degree pursuant to this section is not eligible for suspension or commutation of sentence, probation, pardon, parole, work furlough or release from confinement on any other basis except as specifically authorized by § 31-233, subsection A or B until the sentence imposed by the court has been served.

F. A person who stands convicted of any dangerous crime against children in the first degree having been previously

convicted of two or more predicate felonies shall be sentenced to life imprisonment and is not eligible for suspension or commutation of sentence, probation, pardon, parole, work furlough or release from confinement on any other basis except as specifically authorized by § 31-233, subsection A or B until the person has served not fewer than thirty-five years.

G. Notwithstanding chapter 10 of this title, [Title 13], a person who is at least eighteen years of age or who has been tried as an adult and who stands convicted of a dangerous crime against children in the second degree is guilty of a class 3 felony and shall be sentenced to a persumptive term of imprisonment for ten years. The presumptive term may be increased or decreased by up to five years pursuant to § 13-702, subsections C, D and E. If the person is sentenced to a term of

imprisonment the person is not eligible for release from confinement on any basis until the person has served not less than one-half the sentenced imposed by the court.

H. Section 13-604, subsections H and I apply to the determination of prior convictions.

I. In addition to the term of imprisonment imposed pursuant to this section and notwithstanding any other law, the court shall order that a person convicted of any dangerous crime against children in the first degree be supervised on parole after release from confinement on such conditions as the court or the board of pardons and paroles deems appropriate for the rest of the person's life. If the person is convicted of any dangerous crime against children in the second degree the court, in addition to any term of imprisonment imposed or in lieu of the term if

probation is otherwise authorized, may order that the person convicted be supervised on probation or on parole after release from confinement on such conditions as the court or board of pardons and paroles deems appropriate for any term up to the rest of the person's life.

J. The sentence imposed on a person by the court for a dangerous crime against children in the first or second degree shall be consecutive to any other sentence imposed on the person at any time.

K. In this section:

1. "Dangerous crime against children" means any of the following committed against a minor under fifteen years of age:

(a) Second degree murder.

(b) Aggravated assault resulting in serious physical injury or committed by

the use of a deadly weapon or dangerous instrument.

(c) Sexual assault.

(d) Molestation of a child.

(e) Sexual conduct with a minor.

(f) Commercial sexual exploitation of a minor.

(g) Sexual exploitation of a minor.

(h) Child abuse as defined in § 13-3623, subsection B, paragraph 1.

(i) Kidnapping.

(j) Sexual abuse.

(k) Taking a child for the purpose of prostitution as defined in § 13-3206.

(l) Child prostitution as defined in § 13-3212.

(m) Involving or using minors in drug offenses.

A dangerous crime against children is in the first degree if it is a completed offense and is in the second degree if it is a preparatory offense.

2. "Predicate felony" means any felony involving child abuse, a sexual offense, conduct involving the intentional or knowing infliction of serious physical injury or the use or exhibition of a deadly weapon or dangerous instrument, or a dangerous crime against children in the first or second degree.

Supreme Court, U.S.
FILED
OCT 16 1992
OFFICE OF THE CLERK

IN THE SUPREME COURT
OF THE
UNITED STATES

October Term, 1992

No. 92-532

STATE OF ARIZONA, Petitioner,

vs.

JOSEPH BARTLETT, JR., Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF ARIZONA

BRIEF IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

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STATEMENT OF THE CASE

In January, 1987, Joseph Bartlett, Jr. (Joe), then 23 years of age, was living in a mobile home court near the local high school in Sierra Vista, Arizona. He and his wife Nancy had separated some months before and Joe was living in the trailer, either alone or with his mother and at times with his wife and three children. The family had moved to Sierra Vista from Clovis, California, after Joe's step-father committed suicide in 1985. Although Joe was unemployed, he had worked at various jobs in Sierra Vista and had worked as a security guard in California. Joe had no felony convictions.

In the latter part of 1986, Joe met Mary, age 14, Susan, age 14, and another girl, age 15 (the fictitious names used by the Arizona Supreme Court are utilized herein). These girls lived in or regularly visited Joe's trailer park. Mary and Susan, who were best friends, were not virgins when they met Joe. In fact, they were both quite experienced sexually. Joe began to date Mary who was living with Joe's mother in late 1986. Mary had voluntary sexual intercourse with Joe in December, 1986, when she was 14 years and 10 months of age. Susan also had voluntary sexual intercourse with Joe in December, 1986 when she was 14 years and 6 months of age.

On January 10, 1987, a Sierra Vista Police Officer went to Susan's home after it was reported that Susan's mother had discharged a rifle. Susan's mother told the officer that the rifle discharged as she was loading it with the intent to shoot Joe who was her neighbor. Susan's mother also reported to the police that Joe had forcibly sexually assaulted Susan.

When Joe later learned from neighbors that the police were asking about him, he voluntarily went to the police station. When the police asked about Susan, Joe explained that Susan had invited herself into his home one evening and began "teasing" him. He further explained that Susan began to massage his penis through his pants and then moved her hands inside his pants. At first Joe resisted, telling Susan to "knock it off" and go home. Susan did go home; however, she returned later that night. Susan let herself into Joe's home, sat on Joe's lap and kissed him. Joe went into his bedroom and Susan followed. The two undressed, had sex and afterward Susan kissed Joe goodnight. Joe admitted that he knew Susan was under 15 years of age at the time.

The police officer also indicated that Susan told him Joe had sex with her friend Mary. Joe readily admitted that Mary had been his girlfriend; that they dated for several months, going to the movies, dinner and the like. Sometime during their courtship, Mary told Joe that her mother advised her to use some form of birth control if she was going to have sexual relations. Joe admitted that the two thereafter had consensual sexual intercourse. Joe also admitted that he knew Mary was under 15 years of age at the time.

Joe returned home after the interview. A short time later, on January 23, 1987, the Cochise County Grand Jury indicted Joe for committing sexual conduct: with a 15 year old girl (a class 6 felony); with Mary, age 14 (a class 2 felony); and with Susan, age 14 (a class 2 felony). The State alleged that the crimes were in violation of A.R.S. Section 13-1405 (Appendix A), which is the substantive criminal law statute. The State also alleged the

provisions of A.R.S. Section 13-604.01 (Appendix B), which provides for enhanced punishment for certain crimes against children, including sexual conduct with a minor under 15 years of age. A.R.S. Section 13-604.01 did not apply to the charge involving the 15 year old. For that charge, the punishment is controlled by A.R.S. Section 13-701 (Appendix C), which is the general punishment statute.

Under the indictment, Joe's potential sentence for the charge involving the 15 year old could have been probation or incarceration for between 9 months and 1.87 years. At the same time, the potential sentence for the charges involving the 14 year olds was a minimum of 15 years and a maximum of 25 years, without possibility of release on each count.

During the pretrial proceedings, the State offered Joe a plea agreement covering all three charges which stipulated that he serve 5 years in the Arizona Department of Corrections. Joe rejected the plea agreement on June 19, 1987. Joe's court appointed attorney was allowed to withdraw from the case because of the rejection of the plea and substitute counsel was appointed.

On July 2, 1987, the State moved to invoke the enhanced sentencing provisions of A.R.S. Section 13-604(H) (Appendix D). Under the combination of statutes invoked, the sentences must be served consecutively, the the latter sentence being further enhanced by the "prior" conviction. Therefore, convictions for having sex with Mary and Susan would require a minimum term of 40 years, a presumptive term of 50 years and a maximum term of 60 years, all to be served without possibility of release.

Joe was tried in absentia on August 11, 1987. The jury convicted him with committing sexual conduct with Susan and Mary. He was acquitted of the charge of having sexual conduct with the 15 year old.

At sentencing on January 4, 1989, the trial court was required to sentence Joe to a minimum mandatory sentence of 40 years imprisonment without possibility of relase. Had Mary been 2 month older and Susan 6 months older, Joe would have been eligible for probation and the maximum possible sentence would have been 22 and 1/2 months with early release possible.

The trial judge, Richard A. Winkler, reluctantly applied the mandatory minimum sentence of 40 years and commented as follows:

> My function, as I view it, is not to second guess the legislature in regard to sentencing, but to follow the law. I took an oath to do that. The law is very severe. The law is more severe than -- or the punishment is severe. The punishment is more severe than in many other types of cases that are very serious offenses. But it is not my function to second guess what the wisdom of the sentence is.
>
> If in fact the sentence is too severe, I think that's for the Appellate Court to review. So I really have nothing else to say in regard to the sentencing. I'm going to impose the mitigated term, because I think that is plenty severe in this case.

Joe appealed to the Arizona Court of Appeals raising his Eighth Amendment argument. That court rejected the argument and affirmed his sentence.

The Arizona Supreme Court found Joe's sentence to be disproportionate. The 40 year sentence was vacated and the case remanded to the trial court for resentencing. The Arizona Supreme Court refused to stay its mandate pending review in this Court and the case went back to the trial court.

At resentencing on August 27, 1990, the trial court could impose minimum sentences of 5.25 years on the prior count and 7 years on the second count. Both sentences could be served concurrently with parole become possible after 2/3 of the sentences were served. The maximum sentence authorized was 35 years.

This time the trial court was presented with certain facts that were unknown at the time of the first sentencing. The State stipulated to the admission of documentary evidence showing that Mary and the 15 year old included in the original indictment against Joe had charged another man with a similar offense approximately 1 month after Joe was convicted. Mary had explained to her friends, in graphic detail, her sexual adventures with the other man which were initiated by her voluntary offer of oral sex. Although a criminal complaint had been filed against the other man, those charges were dropped and he was released from jail.

Joe and his attorney, David P. Flannigan also presented the trial court with a brief synopsis of Joe's situation:

> Mr. Flannigan: ... treated as a child molester ... he's on the absolutely lowest rung of the prison society. He has personally suffered immensely. He's been beaten, sexually raped, abused, victimized, threatened. Those are his day to day experience(s). He has suffered, in fact, a mental breakdown, has had to see a psychiatrist. Compromised himself in order to survive this kind of situation. It's an awful, awful world that he has been introduced into.
>
> If it could be said according to the evidence that he at all sinned against these girls, he's certainly been sinned against far more than that, and he has suffered immensely. If the purpose of punishment is to make him suffer, his suffering at this point far exceeds any harm to the victims.
>
> Mr. Bartlett: ... I agree with what Mr. Flannigan says,

> because it has been hard in prison, really hard. I want this Court to know that I have no resentment towards anyone. I have found my peace with God and with myself.
>
> My only wish is to finally go home, to be with my family, get a good, honest job and be a productive member of society and be the best father I can to my kids. I ask that this Court have mercy on me.

Thereupon, the trial court sentenced Joe to the mandatory minimum terms of 5.25 and 7 years in prison, to run concurrently, with credit for time served. The trial court observed as follows:

> The Court finds that the mitigating factor here that would require the mitigated term for sentencing would be that the Defendant had no prior record, and I just, quite frankly, feel that the mitigated term is sufficient punishment for the facts of this case.

On June 28, 1991, this Court vacated the Arizona Supreme Court's judgment and remanded the matter for further consideration in light of Harmelin v. Michigan, 501 U.S. ___ (1991). Upon remand, the court below conducted the proportionality analysis contained in Harmelin and once again found the original 40 year sentence to be disproportionate. The court below reinstated the 5.25 and 7 year sentences imposed by the trial court on resentencing.

The State of Arizona then failed to move the Arizona Supreme Court to stay its mandate in a timely manner. Thereafter, the State requested the Arizona court to recall and stay its mandate pending the filing of the present Petition. The court below denied that motion. (Appendix E). Respondent continues to serve his sentence. He is scheduled to be released from the Arizona State Prison in the early part of 1993.

SUMMARY OF THE ARGUMENT

The real issue dividing the Arizona Supreme Court below is whether Justice Kennedy meant what he said in his concurring opinion in Harmelin v. Michigan, ___ U.S. ___, 111 S.Ct. 2680 (1991). The entire court below looked to Justice Kennedy's concurring opinion in defining the proper test to be used in determining whether a non-capital sentence was disproportionately severe. However, the majority of the court below, by Chief Justice Feldman, applied the approach articulated by Justice Kennedy. The dissent, by Justice Corcoran, used what was perceived as the test applied by Justice Kennedy. For the dissent, Harmelin announced a new rational basis test supplanting prior caselaw of this Court.

In Harmelin, Justice Kennedy explained the proper use of the proportionality test set forth in Solem v. Helm, 463 U.S. 277 (1983). There was no need to apply the "Solem three prong test" to the facts of Harmelin. The severity of the drug offense there, in itself, was sufficient to warrant a life sentence. There was no need for further analysis.

Harmelin did not overrule or "eviserate" the Solem analysis. Justice Kennedy's application of the proportionality test was not dissimiliar to the analysis used by this and other courts both before and after Harmelin. Further, the "holding" of Harmelin that the sentence there passed constitutional muster is directly applicable to

other drug cases which comprise the majority of cases raising the issue of proportionality.

Finally, the issue of "individualized sentencing" in non-capital cases, which did garner a majority of the Harmelin Court, is simply not at issue in the present case. Respondent no where challenges the proposition that a state legislature can constitutionally enact mandatory sentences in non-capital cases. Respondent is currently serving a mandatory sentence without complaint. Petitioner's attempt to insert that issue into this case presents little more than a red herring.

In the end, the Arizona Supreme Court correctly analyzed the facts of the present case in light of Harmelin. After doing so, that court correctly found Respondent's sentence disproportionately severe. Nothing the court did below is incorrect or inconsistent with any precedent of this Court. The present case is simply not one that warrants review by this Court. Therefore, the Petition for Writ of Certiorari should be denied.

ARGUMENT

THE ARIZONA SUPREME COURT PROPERLY FOUND THAT A FORTY YEAR SENTENCE OF IMPRISONMENT, WITHOUT POSSIBILITY OF RELEASE ON ANY TERMS, IS GROSSLY DISPROPORTIONATE TO THE THE CRIME OF ENGAGING IN NONVIOLENT, NONINCESTUOUS, HETEROSEXUAL AND CONSENSUAL SEXUAL RELATIONS WITH TWO WILLING POST-PUBESCENT TEENAGERS.

A. The effect of Harmelin in the case below.

A unanimious Arizona Supreme Court previously found Joesph Bartlett, Jr.'s forty year sentence unconstitutionally disproportionate. State v. Bartlett, 164 Ariz. 229, 792 P.2d 692 (1991). Thereafter, this Court granted Arizona's Petition for Writ of Certiorari, vacated that judgment and remanded for further

consideration in light of Harmelin v. Michigan, ___ U.S. ___, 111 S.Ct. 2680 (1991). Arizona v. Bartlett, ___ U.S. ___, 111 S.Ct. 2880 (1991) (Bartlett I).

Upon remand, the Arizona Supreme Court first correctly found that Solem v. Helm survived Harmelin. Neither a majority nor a plurality in Harmelin was willing to overrule Solem or any other of this Court's prior proportionality decisions.

On the other hand, the Arizona Supreme Court did perceive a change in the application of the proportionality analysis set forth in Solem. Instead of the strict adherence to Solem's three-prong test advocated by the Harmelin dissent, the Arizona court applied Justice Kennedy's "harmonized" proportionality analysis. Under that harmonized analysis, the court first undertakes a threshold application of the first prong of the Solem test in determining gross disproportionality. Harmelin at ___, 111 S.Ct. at 2707. If that threshold test indicates gross disproportionality, then the other two Solem prongs are viewed in order to validate or invalidate that initial inference. Id. After faithfully applying Justice Kenndey's harmonized analysis, the Arizona Supreme Court once again found that Respondent's forty year sentence was unconstitutionally disproportionate. State v. Bartlett, ___ Ariz. ___, 830 P.2d 823 (1992) (Bartlett II).

The author of Bartlett I, Justice Corcoran, dissented in Bartlett II after remand from this Court. In Bartlett II, Justice Corcoran also looked to Justice Kennedy's opinion in Harmelin for guidance. However, instead of applying the test articulated by Justice Kennedy

in Harmelin, Justice Corcoran instead applied a test which he felt was conducted by Justice Kennedy.

In Justice Corcoran's opinion, Harmelin signalled a distinct departure from this Court's prior proportionality caselaw. Instead of the test set forth by Justice Kennedy, the dissent below applied a rational basis test in analyzing Respondent's sentence. As stated by Justice Corcoran, in conducting a proportionality review:

> I believe that we must look not at the facts or particular circumstances of the crime, but we must decide whether the legislature could, with reason, conclude that the threat posed to the individual and to society by defendant's offenses is momentous enough to warrant the deterrence and retribution of the sentences imposed. See Harmelin, ___ U.S. ___, 111 S.Ct. at 2706. If such a rational basis exists, then the sentences imposed are not grossly disproportionate to the severity of defendant's crime. Id.

Bartlett II at ___, 830 P.2d at 835.

The position of the dissent below would mean that Solem v. Helm is either overruled or "eviserated." Harmelin did neither.

In Bartlett I this Court instructed the Arizona Supreme Court to reconsider its previous decision in light of Harmelin. The Arizona Supreme Court faithfully followed that instruction and correctly found that Respondent's forty year sentence was constitutionally disproportionate under the harmonized Harmelin analysis. A brief analysis of Harmelin confirms that result.

B. An analysis of Harmelin.

1. Harmelin's proportionality holding.

The issue of individualized sentencing was the only one that garnered a majority of the Court. That issue is discussed below. However, while a majority of the Court could not agree on the other

issues prsented, in the end, Mr. Harmelin's life sentence was upheld. In this situation, the rule of decision is provided by Marks v. United States, 430 U.S. 188 (1977). As explained in Marks:

> When a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, the holding of the Court may be viewed as that position taken by those Members who concurred in the judgment on the narrowest grounds ... .

Id at 193.

In this light, the proportionality holding in Harmelin was that life imprisonment without possibility of release was not unconstitutionally disproportionate to a first-time offense of possession of 672 grams of cocaine. This holding is directly applicable to similar drug cases. For example, in United States v. Van Winrow, 951 F.2d 1069 (9th Cir. 1991), the court looked to this holding in Harmelin in rejecting a proportionality attack in a similar drug case. No extended analysis was necessary because of the similarity of offenses.

In fact, most of the cases in which a proportionality argument is raised involve sentences for drug offenses. The holding in Harmelin and other cases such as Hutto v. Davis, 454 U.S. 370 (1982) are outcome determinative in those similar drug cases without any type of extensive analysis. See e.g., United States v. Abreu, 962 F.2d 1425 (10th Cir. 1992); United States v. Salmon, 944 F.2d 1106 (3d Cir. 1991), cert. denied, 112 S.Ct. 1213 (1992); State v. Isom, 408 S.E.2d 701 (Ga.1991). Thus, the majority of the cases raising the issue of proportionality will be effectively resolved on the basis of Harmelin and similar cases.

2. Justice Kennedy's harmonized proportionality test.

Any analysis of Justice Kennedy's approach must begin, as he did, with a focus on the principle of stare decisis. Above all else, Justice Kennedy attempted to harmonize this Court's proportionality decisions. He avowedly did not overrule or "eviserate" Solem. Instead, he harmonized the Solem analysis with other proportionality decisions.

In elucidating the "narrow proportionality principle" contained in the Eighth Amendment, Justice Kennedy reasoned that Solem is "best understood as holding that comparative analysis within and between jurisdictions is not always relevant to proportionality review." Harmelin at ___, 111 S.Ct. at 2707. According to Justice Kennedy, a court should initially apply the first Solem factor - comparing the gravity of the offense and the harshness of the penalty - in making a threshold determination of gross disproportionality. Id. If an inference of gross disproportionality arises from that threshold determination then the second and third prongs of the Solem test are to be utilized to validate or invalidate that initial inference. Id.

An essential part of the threshold test continues to include a weighing of the gravity of the offense. In assessing this element, "(c)omparisons can be made in light of the harm caused or threatened to the victim or society, and the culpability of the offender." Solem at 293. (emphasis added). Justice Kennedy no where criticized the first Solem factor or its analysis. It should continue to be used in making the threshold determination of gross disproportionality.

The dissent below makes much of the fact that Justice Kennedy did

not view the individual culpability of Mr. Harmelin in his analysis. From this, the dissent finds that the Solem analysis has, in effect, been replaced with a rational basis test. In other words, the dissent supposes that Justice Kennedy accomplished, sub silento, that which he expressly refused to do - the overruling or eviseration of Solem. This is simply not the case.

The analysis conducted by Justice Kennedy in Harmelin is wholly consistent with Solem. The Solem Court itself was willing to say that "no sentence of imprisonment would be disproportionate" for some crimes such as the crime of felony murder. Solem at 290, n. 15. With this observation one would not expect the Solem Court to undertake an extensive analysis in finding any prison term for felony murder constitutional. Indeed, the Solem court itself noted that "a reviewing court rarely will be required to engage in extended analysis to determine that a sentence is not constitutionally disproportionate. Id at 290, n. 16.

Consistent with this direction, many courts applied an "abbreviated" Solem analysis before Harmelin. For example, in United States v. Whyte, 892 F.2d 1170, 1176, n. 16 (3d Cir. 1989), the court's analysis "focused primarily on the first Solem factor" in upholding the 35 year sentence there involved. Similarly, in United States v. Mendes, 912 F.2d 434, 441 (10th Cir. 1990), the court found "that the severity of Mendes' sentence under (21 U.S.C.) section 841(b) is not disproportionate to his offense under Solem, and a full Solem proportionality analysis is unneccesary on these facts." (upholding a 10 year sentence for possession with intent to distribute

cocaine and heroin). See also Moreno v. Estelle, 717 F.2d 171, 180 (5th Cir. 1983) (no Solem analysis necessary because "Rummel still provides the rule in cases with fact situations not clearly distinguishable from that in Rummel itself).

The post-Harmelin case of People v. Gaskins, 825 P.2d 30 (Colo. 1992), provides another interesting example. It is true that the court there indicated that without more definitive guidance it would adhere to its prior understanding of Solem. Id at 34, n. 10. However, Colorado's abbreviated Solem test, which was based on pre-Harmelin caselaw, is strikingly similar to the test advanced by Justice Kennedy.

Justice Kennedy's analysis in Harmelin is consistent with this line of cases. In reaching his conclusion, he found that the "severity of (Harmelin's) crime brings his sentence within the constitutional boundaries established by our prior decisions." Harmelin at ___, 111 S.Ct. at 2706. Harmelin's sentence was first compared to the 40 year sentence for possession with intent to distribute nine ounces of marijuana in Hutto v. Davis, 454 U.S. 370 (1982). Justice Kennedy then observed that it was rational to conclude that Harmelin's possession of that large an amount of cocaine was "as serious and violent as the crime of felony murder." Harmelin at ___, 111 S.Ct. at 2706. Therefore, "(i)n light of the gravity of (Harmelin's) offense, a comparison of his crime with his sentence does not give rise to an inference of gross disproportionality ... ." Id at 2707.

This does not mean that the Eighth Amendment is reduced to

measurement by a rational basis test applied in the abstract. Because of the nature of the offense there involved, there was no need to make an extensive analysis of Harmelin's culpability. It was the severity of the crime, itself, and a comparison with prior caselaw that determined the result. In this respect, reference to prior similar caselaw is a shorthand comparative analysis and this type of analysis is consistent with Solem based on the facts involved.

The facts of the present case call for a different analysis. If Solem is to have any meaning it requires that the culpability of Respondent be assessed in determining the constitutionality of his sentence. Certainly, it would not be rational to conclude that engaging in consensual sex with post-pubescent teenagers is "as serious and violent as the crime of felony murder." In the context of the present case, the culpability of the offender is a necessary element in the application of any gross disproportionality analysis.

Of course, this is not to say that the offender's culpability must be assessed in every case. It is one element that can be assessed. If a court is confronted with a proportionality attack in a case of felony murder, the type of crime itself will conclude the result without an assessment of personal culpability. In addition, the same can be said, at least after Harmelin, in similar drug cases.

3. Individualized sentencing.

A majority of the Harmelin Court clearly held that the Eighth Amendment does not require individualized sentencing in non-captial cases. Respondent has no quarrel with this holding. Respondent never raised this issue in the court below and that issue has no bearing on

the issue of the proportionality of his sentence. Those issues are clearly distinct. In fact, Respondent is currently serving a mandatory sentence in this case without complaint.

The concept of individualized sentencing is unique to captial punishment cases. In those cases, individualized sentencing means that the sentencer may not refuse to consider or be precluded from considering any relevant mitigating evidence. Hitchcock v. Dugger, 481 U.S. 393 (1987). Simply put, a mandatory death penalty constitutes cruel and unusual punishment. In each capital case there must be "an individualized determination that that punishment is 'appropriate' - whether or not the sentence is 'grossly disproportionate.'" Harmelin at ___, 111 S.Ct. at 2701.

In a non-capital case, a court is not required to consider any mitigating circumstances in the normal case. However, that does not mean a court is precluded from considering aggravating and mitigating circumstances in determining whether a sentence, mandatory or not, is grossly disproportionate.

Without the ability to view the aggravating and mitigating circumstances of an individual case, any meaninful proportionality review would be impossible. As stated by the court below:

> Surely, if this court has a responsibility to review the constitutionality of sentences under the eighth amendment, that duty requires us to apply the standards of the federal constitution to the facts of what occurred, no matter what label the legislature has attached to the criminalizing statute. Legislatures must of necessity paint with a broad brush, leaving it to the courts to measure constitutionality by applying law to facts -- the true judicial function.

Bartlett II at ___, 830 P.2d at 829.

If a court is precluded from viewing the individual circumstances

of a case in assessing proportionality, then any proportionality review would of necessity be little more than a second-guessing of the legislature. The courts would be painting with the same broad brush that the legislature must. Neither would be able to view any individual case. In essence, because of the judicial defference to legislative line-drawing, there would be no proportionality review by any court. In essence, the Eighth Amendment would have no effect on the legislature in a non-capital case. Harmelin certainly does not stand for that result.

CONCLUSION

Upon remand in Bartlett I, the Arizona Supreme Court carefully reviewed the facts of this case in light of Harmelin. After doing so, the court found that Bartlett's "original sentence constituted cruel and unusual punishment under the limited proportionality analysis and principle articulated in Justice Kennedy's concurring opinion in Harmelin." Bartlett II at ___, 830 P.2d at 832. The dissent below would not disagree with this statement. However, the dissent was willing to read more into the concurring opinion of Harmelin than was there in order to find that Solem was effectively overruled.

The difference of opinion spliting the Arizona court can also be seen, to varying degrees, in other courts addressing the proportionality issue. However, the lively discussion concerning the effect of Harmelin has not lead to divergent results. It is indeed only the rare non-capital case in which a sentence is found to be disproportionate - regardless of the analysis. In the time between Solem and Harmelin, Respondent is aware of four cases in which

sentences were reversed on the basis of a proportionality review. See, Harmelin at ___, 111 S.Ct. at 2713, n. 2 (White, J., dissenting). After Harmelin, Respondent is not aware of any case, except the present one, in which a sentence has been reversed on the basis of a proportionality review under the Federal Constitution. Cf. People v. Bullock, 485 N.W.2d 866 (Mich. 1992) (striking down the statutory provision involved in Harmelin under the Michigan Constitution).

Neither have the courts been inundated with cases challenging sentences that are disproportionate. In most cases in which the issue is addressed, the proportionality issue is quickly disposed of as one of many issues raised by a criminal defendant.

Harmelin did not signal a marked change in the law. As discussed above, many courts applied a similar narrow proportionality analysis prior to Harmelin. After Harmelin, the various courts below are fleshing out the parameters of the narrow proportionality principle elucidated by Justice Kennedy. The present case is but one of those cases.

In a real sense, it cannot be said that the decision of the Arizona Supreme Court below conflicts with the decision of another state court of last resort or of a United States Court of Appeals. The decision below certainly does not conflict with the applicable decisions of this Court. The Arizona Supreme Court faithfully applied the harmonized proportionality analysis set forth by Justice Kennedy in Harmelin which, by its own terms, considers the various applicable decisions of this Court. As such, the present case is simply not a

proper one for this Court to grant Arizona's Petition for Writ of Certiorari and that Petition should be denied.

RESPECTFULLY SUBMITTED,

HICKS & CONLOGUE, P.C.

By: J. Conlogue
James L. Conlogue
Attorney for Respondent

§ 13–1405. Sexual conduct with a minor; classifications

A. A person commits sexual conduct with a minor by intentionally or knowingly engaging in sexual intercourse or oral sexual contact with any person who is under eighteen years of age.

B. Sexual conduct with a minor under fifteen years of age is a class 2 felony and is punishable pursuant to § 13–604.01. Sexual conduct with a minor fifteen years of age or over is a class 6 felony.

Added by Laws 1977, Ch. 142, § 63, eff. Oct. 1, 1978. Amended by Laws 1983, Ch. 202, § 8; Laws 1985, Ch. 364, § 18, eff. May 16, 1985.

Historical Note

Source:

Pen.Code 1901, §§ 230, 233.
Pen.Code 1913, §§ 231, 234.
Rev.Code 1928, § 4596.
Code 1939, § 43–4901.
A.R.S. former §§ 13–611, 13–614.
Laws 1962, Ch. 52, §§ 1, 2.
Laws 1967, Ch. 62, § 9.
Laws 1976, Ch. 111, § 5.

The 1983 amendment deleted at the end of subsec. A "and who is not his or her spouse"; and rewrote subsec. B, which had read:

"Sexual conduct with a minor under fifteen years of age is a class 2 felony. Sexual conduct with a minor fifteen years of age or over is a class 6 felony."

The 1985 amendment rewrote subsec. B which read:

"Sexual conduct with a minor under fifteen years of age is a class 2 felony, and the person convicted is not eligible for suspension or commutation of sentence, probation, pardon, parole, work furlough or release from confinement on any other basis except as specifically authorized by § 31–233, subsection A or B until the sentence imposed by the court has been served. Sexual conduct with a minor fifteen years of age or over is a class 6 felony."

Former § 13–1405 was renumbered as § 13–3885.

1983 Reviser's Note:

In the section heading "molestation of a minor" was deleted pursuant to authority of § 41–1304.02.

§ 13–604.01. Dangerous crimes against children; sentences; definitions

A. Except as otherwise provided in this section, a person who is at least eighteen years of age or who has been tried as an adult and who stands convicted of a dangerous crime against children in the first degree involving second degree murder, sexual assault, taking a child for the purpose of prostitution, child prostitution or sexual conduct with a minor or involving or using minors in drug offenses shall be sentenced to a presumptive term of imprisonment for twenty years. If the convicted person has been previously convicted of one predicate felony the person shall be sentenced to a presumptive term of imprisonment for thirty years.

B. Except as otherwise provided in this section, a person who is at least eighteen years of age or who has been tried as an adult and who stands convicted of a dangerous crime against children in the first degree involving aggravated assault, molestation of a child, commercial sexual exploitation of a minor, sexual exploitation of a minor, child abuse or kidnapping shall be sentenced to a presumptive term of imprisonment for seventeen years. If the convicted person has been previously convicted of one predicate felony the person shall be sentenced to a presumptive term of imprisonment for twenty-eight years.

C. Except as otherwise provided in this section, a person who is at least eighteen years of age or who has been tried as an adult and who stands convicted of a dangerous crime against children in the first degree involving sexual abuse shall be sentenced to a presumptive term of imprisonment for

ten years. If the convicted person has been previously convicted of one predicate felony the person shall be sentenced to a presumptive term of imprisonment for fifteen years.

D. The presumptive sentences prescribed in subsections A, B and C of this section may be increased or decreased by up to five years pursuant to the provisions of § 13–702, subsections C, D and E.

E. A person sentenced for a dangerous crime against children in the first degree pursuant to this section is not eligible for suspension or commutation of sentence, probation, pardon, parole, work furlough or release from confinement on any other basis except as specifically authorized by § 31–233, subsection A or B until the sentence imposed by the court has been served.

F. A person who stands convicted of any dangerous crime against children in the first degree having been previously convicted of two or more predicate felonies shall be sentenced to life imprisonment and is not eligible for suspension or commutation of sentence, probation, pardon, parole, work furlough or release from confinement on any other basis except as specifically authorized by § 31–233, subsection A or B until the person has served not fewer than thirty-five years.

G. Notwithstanding chapter 10 of this title,[1] a person who is at least eighteen years of age or who has been tried as an adult and who stands convicted of a dangerous crime against children in the second degree is guilty of a class 3 felony and shall be sentenced to a presumptive term of imprisonment for ten years. The presumptive term may be increased or decreased by up to five years pursuant to § 13–702, subsections C, D and E. If the person is sentenced to a term of imprisonment the person is not eligible for release from confinement on any basis until the person has served not less than one-half the sentence imposed by the court.

H. Section 13–604, subsections H and I apply to the determination of prior convictions.

I. In addition to the term of imprisonment imposed pursuant to this section and notwithstanding any other law, the court shall order that a person convicted of any dangerous crime against children in the first degree be supervised on parole after release from confinement on such conditions as the court or the board of pardons and paroles deems appropriate for the rest of the person's life. If the person is convicted of any dangerous crime against children in the second degree the court, in addition to any term of imprisonment imposed or in lieu of the term if probation is otherwise authorized, may order that the person convicted be supervised on probation or on parole after release from confinement on such conditions as the court or board of pardons and paroles deems appropriate for any term up to the rest of the person's life.

J. The sentence imposed on a person by the court for a dangerous crime against children in the first or second degree shall be consecutive to any other sentence imposed on the person at any time.

K. In this section:

1. "Dangerous crime against children" means any of the following committed against a minor under fifteen years of age:

(a) Second degree murder.

(b) Aggravated assault resulting in serious physical injury or committed by the use of a deadly weapon or dangerous instrument.

(c) Sexual assault.

(d) Molestation of a child.

(e) Sexual conduct with a minor.

(f) Commercial sexual exploitation of a minor.

(g) Sexual exploitation of a minor.

(h) Child abuse as defined in § 13-3623, subsection B, paragraph 1.

(i) Kidnapping.

(j) Sexual abuse.

(k) Taking a child for the purpose of prostitution as defined in § 13-3206.

(*l*) Child prostitution as defined in § 13-3212.

(m) Involving or using minors in drug offenses.

A dangerous crime against children is in the first degree if it is a completed offense and is in the second degree if it is a preparatory offense.

2. "Predicate felony" means any felony involving child abuse, a sexual offense, conduct involving the intentional or knowing infliction of serious physical injury or the use or exhibition of a deadly weapon or dangerous instrument, or a dangerous crime against children in the first or second degree.

Added by Laws 1985, Ch. 364, § 6, eff. May 16, 1985. Amended by Laws 1987, Ch. 166, § 1; Laws 1987, Ch. 307, § 4.

[1] Section 13-1001 et seq.

Historical Note

Laws 1987, Ch. 166, § 1, provided in subsec. A for taking a child for the purpose of prostitution and child prostitution, and add pars. (1)k and 1(*l*) to subsec. K.

Laws 1987, Ch. 307, § 4, provided for involving a minor in a drug offense in subsec. A, and added subsec. K1(m).

Former § 13-604.01, added by Laws 1982, Ch. 322, § 2, amended by Laws 1983, Ch. 32, § 1, Laws 1984, Ch. 163, § 1, and Laws 1985, Ch. 227, § 1, and relating to punishment for offenses committed while released from confinement, was renumbered as § 13-604.02 by Laws 1985, Ch. 364, § 5, effective May 16, 1985.

1987 Reviser's Note:

This section contains the amendments made by Laws 1987, Ch. 166, § 1 and Ch. 307, § 4, which were blended together as shown above pursuant to authority of § 41-1304.03.

§ 13–701. Sentence of imprisonment for felony; presentence report

A. A sentence of imprisonment for a felony shall be a definite term of years and the person sentenced, unless otherwise provided by law, shall be committed to the custody of the state department of corrections.

B. No prisoner may be transferred to the custody of the state department of corrections without a certified copy of the judgment and sentence, signed by the sentencing judge, and a copy of a recent presentence investigation report unless the court has waived preparation of the report.

C. Except as provided in § 13–604 the term of imprisonment for a felony shall be determined as follows for a first offense:

1. For a class 2 felony, seven years.
2. For a class 3 felony, five years.
3. For a class 4 felony, four years.
4. For a class 5 felony, two years.
5. For a class 6 felony, one and one-half years.

Added as § 13–901 by Laws 1977, Ch. 142, § 57, eff. Oct. 1, 1978. Renumbered as § 13–701 and amended by Laws 1978, Ch. 201, §§ 104, 105, eff. Oct. 1, 1978. Amended by Laws 1988, Ch. 66, § 1.

Historical Note

Source:

Rev.Code 1928, § 4585.
Code 1939, § 43–2903.
A.R.S. former § 13–453.

The 1978 amendment substituted "shall be a definite term of years and the person sentenced unless otherwise provided by law, shall be committed to the custody of the department of corrections" for "except as provided in § 13–704, shall be a presumptive sentence" in subsec. A, and inserted "except as provided in § 13–604" in subsec. B.

The 1988 amendment inserted "state" preceding "department" in subsec. A; inserted subsec. B; and redesignated former subsec. B as subsec. C.

Section 13–701 as added by Laws 1977, Ch. 142, § 48, eff. Oct. 1, 1978, was transferred and renumbered as § 13–601; see italicized note preceding this section.

Original § 13–701, derived from Pen.Code 1901, §§ 30, 31, 33; Pen.Code 1913, §§ 30, 31, 33; Rev.Code 1928, § 4492; Code 1939, § 43–5701, and defining treason and provided punishment therefor, was repealed by Laws 1977, Ch. 142, § 23, eff. Oct. 1, 1978.

For disposition of the subject matter of sections of the former Criminal Code, see Disposition Tableat the front of this volume

1978 Reviser's Note:

Pursuant to authority of § 41–1304.02, a comma was added after the word "sentenced" in subsection A, and the words "Except as provided in § 13–604" were transposed to the beginning of the sentence in subsection B.

§ 13–604. Dangerous and repetitive offenders; definition

A. Except as provided in subsection F of this section or § 13–604.01, a person who is at least eighteen years of age or who has been tried as an adult and who stands convicted of a class 4, 5 or 6 felony, whether a completed or preparatory offense, and who has previously been convicted of any felony within ten years next preceding the date of the present offense shall be sentenced to imprisonment for not less than the sentence and not more than twice the sentence authorized by § 13–701 for the offense for which the person currently stands convicted and shall not be eligible for suspension or commutation of sentence, probation, pardon or parole, work furlough or release from confinement on any other basis except as specifically authorized by § 31–233, subsection A or B until not less than one-half of the sentence imposed by the court has been served. Upon imposing a sentence pursuant to this subsection the court shall impose as a presumptive term the median of the allowable range. The presumptive term may be mitigated or aggravated within the range prescribed under this subsection pursuant to the terms of § 13–702, subsections C, D and E.

B. Except as provided in subsection G of this section or § 13–604.01, a person who is at least eighteen years of age or who has been tried as an adult and who stands convicted of a class 2 or 3 felony, whether a completed or preparatory offense, and who has previously been convicted of any felony shall be sentenced to imprisonment for not less than the sentence and not more than three times the sentence authorized by § 13–701 for the offense for which the person currently stands convicted and shall not be eligible for suspension or commutation of sentence, probation, pardon or parole, work furlough or release from confinement on any other basis except as specifically authorized by § 31–233, subsection A or B until not less than two-thirds of the sentence imposed by the court has been served. Upon imposing a

sentence pursuant to this subsection the court shall impose as a presumptive term three-fourths of the median of the allowable range. The presumptive term may be mitigated or aggravated within the range prescribed under this subsection pursuant to the terms of § 13–702, subsections C, D and E.

C. Except as provided in subsection F or N of this section or § 13–604.01, a person who is at least eighteen years of age or who has been tried as an adult and who stands convicted of a class 4, 5 or 6 felony, whether a completed or preparatory offense, and who has been previously convicted of two or more felonies shall be sentenced to imprisonment for at least twice the sentence and not more than three times the sentence authorized by § 13–701 for the offense for which the person currently stands convicted and shall not be eligible for suspension or commutation of sentence, probation, pardon or parole, work furlough or release from confinement on any other basis except as specifically authorized by § 31–233, subsection A or B until not less than two-thirds of the sentence imposed by the court has been served. Upon imposing a sentence pursuant to this subsection the court shall impose as a presumptive term the median of the allowable range. The presumptive term may be mitigated or aggravated within the range prescribed under this subsection pursuant to the terms of § 13–702, subsections C, D and E.

D. Except as provided in subsection G or N of this section or § 13–604.01, a person who is at least eighteen years of age or who has been tried as an adult and who stands convicted of a class 2 or 3 felony, and who has been previously convicted of two or more felonies, shall be sentenced to imprisonment for at least twice the sentence and not more than four times the sentence authorized by § 13–701 for the offense for which the person currently stands convicted and shall not be eligible for suspension or commutation of sentence, probation, pardon or parole, work furlough or release from confinement on any other basis except as specifically authorized by § 31–233, subsection A or B until not less than two-thirds of the sentence imposed by the court has been served. Upon imposing a sentence pursuant to this subsection the court shall impose as a presumptive term three-fourths of the median of the allowable range. The presumptive term may be mitigated or aggravated within the range prescribed under this subsection pursuant to the terms of § 13–702, subsections C, D and E.

E. A person who is at least eighteen years of age or who has been tried as an adult and who stands convicted of any misdemeanor or petty offense, other than a traffic offense, and has been convicted of one or more of the same misdemeanors or petty offenses within two years next preceding the date of the present offense shall be sentenced for the next higher class of offense than that for which such person currently stands convicted.

F. Except as provided in § 13–604.01, a person who is at least eighteen years of age or who has been tried as an adult and who stands convicted of a class 4, 5 or 6 felony involving the intentional or knowing infliction of serious physical injury or the use or exhibition of a deadly weapon or dangerous instrument without having previously been convicted of any felony shall be sentenced to imprisonment for not less than the sentence and not more than

twice the sentence authorized in § 13–701 for the offense for which the person currently stands convicted and shall not be eligible for suspension or commutation of sentence, probation, pardon, parole, work furlough or release from confinement on any other basis except as specifically authorized by § 31–233, subsection A or B until not less than one-half of the sentence imposed by the court has been served. Except as provided in § 13–604.01, upon conviction of a class 4, 5 or 6 felony involving the intentional or knowing infliction of serious physical injury or the use or exhibition of a deadly weapon or dangerous instrument a person who has once previously been convicted of any felony involving the intentional or knowing infliction of serious physical injury or the use or exhibition of a deadly weapon or dangerous instrument shall be sentenced to imprisonment for twice the sentence and not more than three times the sentence authorized in § 13–701 for the offense for which the person currently stands convicted and shall not be eligible for suspension or commutation of sentence, probation, pardon, parole, work furlough or release from confinement on any other basis except as specifically authorized by § 31–233, subsection A or B until not less than two-thirds of the sentence imposed by the court has been served. Except as provided in subsection N of this section or § 13–604.01, upon conviction of a class 4, 5 or 6 felony involving the intentional or knowing infliction of serious physical injury or the use or exhibition of a deadly weapon or dangerous instrument a person who has been previously convicted of two or more felonies involving the intentional or knowing infliction of serious physical injury or the use or exhibition of a deadly weapon or dangerous instrument shall be sentenced to imprisonment for three times the sentence and not more than four times the sentence authorized in § 13–701 for the offense for which the person currently stands convicted and shall not be eligible for suspension or commutation of sentence, probation, pardon, parole, work furlough or release from confinement on any other basis except as specifically authorized by § 31–233, subsection A or B until not less than two-thirds of the sentence imposed by the court has been served. Upon imposing a sentence pursuant to this subsection the court shall impose as a presumptive term the median of the allowable range. The presumptive term may be mitigated or aggravated within the range prescribed under this subsection pursuant to the terms of § 13–702, subsections C, D and E.

G. Except as provided in § 13–604.01, upon a first conviction of a class 2 or 3 felony involving use or exhibition of a deadly weapon or dangerous instrument or upon conviction of a class 2 or 3 felony when the intentional or knowing infliction of serious physical injury upon another has occurred, the defendant shall be sentenced to imprisonment for not less than the sentence and not more than three times the sentence authorized in § 13–701 for the offense for which the person currently stands convicted and shall not be eligible for suspension or commutation of sentence, probation, pardon or parole, work furlough or release from confinement on any other basis except as specifically authorized by § 31–233, subsection A or B until not less than two-thirds of the sentence imposed by the court has been served. Except as provided in § 13–604.01, upon conviction of a class 2 or 3 felony involving the

use or exhibition of a deadly weapon or dangerous instrument or the intentional or knowing infliction of serious physical injury upon another, a person who has once previously been convicted of a class 1, 2 or 3 felony involving the use or exhibition of a deadly weapon or dangerous instrument or the intentional or knowing infliction of serious physical injury on another shall be sentenced to imprisonment for twice the sentence and not more than four times the sentence authorized in § 13–701 for the offense for which the person currently stands convicted and shall not be eligible for suspension or commutation of sentence, probation, pardon or parole, work furlough or release from confinement on any other basis except as specifically authorized by § 31–233, subsection A or B until not less than two-thirds of the sentence imposed by the court has been served. Except as provided in subsection N of this section or § 13–604.01, upon conviction for a class 2 or 3 felony involving the use or exhibition of a deadly weapon or dangerous instrument or the intentional or knowing infliction of serious physical injury upon another, a person who has been previously convicted of two or more class 1, 2 or 3 felonies involving the use or exhibition of a deadly weapon or dangerous instrument or the intentional or knowing infliction of serious physical injury on another shall be sentenced to imprisonment for three times the sentence and not more than five times the sentence authorized in § 13–701 for the offense for which the person currently stands convicted, and shall not be eligible for suspension or commutation of sentence, probation, pardon or parole, work furlough or release from confinement on any other basis except as specifically authorized by § 31–233, subsection A or B until not less than two-thirds of the sentence imposed by the court has been served. Upon imposing a sentence pursuant to this subsection the court shall impose as a presumptive term three-fourths of the median of the allowable range, except in the case of a person with two or more class 1, 2 or 3 felony convictions in which case the presumptive term shall be the median of the allowable range. The presumptive term may be mitigated or aggravated within the range prescribed under this subsection pursuant to the terms of § 13–702, subsections C, D and E. For the purposes of this subsection in determining the applicability of the penalties provided herein for second or subsequent class 2 or 3 felonies, the conviction for any felony committed prior to October 1, 1978 which, if committed after October 1, 1978, could be a dangerous felony under this section may be designated by the state as a prior felony.

H. Convictions for two or more offenses not committed on the same occasion but consolidated for trial purposes may, at the discretion of the state, be counted as prior convictions for purposes of this section. Convictions for two or more offenses committed on the same occasion shall be counted as only one conviction for purposes of this section.

I. A person who has been convicted in any court outside the jurisdiction of this state of an offense which if committed within this state would be punishable as a felony or misdemeanor is subject to the provisions of this section. A person who has been convicted as an adult of an offense punishable as a felony or a misdemeanor under the provisions of any prior code in this state shall be subject to the provisions of this section.

J. Time spent incarcerated within the ten years next preceding the date of the offense for which a person is currently being sentenced under subsection A of this section and time spent incarcerated within the two years next preceding the date of the offense for which a person is currently being sentenced under subsection E of this section shall not be included in the ten years or two years required to be free of convictions for purposes of those subsections.

K. The penalties prescribed by this section shall be substituted for the penalties otherwise authorized by law if the previous conviction, the dangerous nature of the felony or the allegation that the defendant committed a felony while released on bond or on his own recognizance as provided in subsection M of this section is charged in the indictment or information and admitted or found by the trier of fact. The court shall allow the allegation of a prior conviction, the dangerous nature of the felony or the allegation that the defendant committed a felony while released on bond or on his own recognizance at any time prior to the date the case is actually tried unless the allegation is filed fewer than twenty days before the case is actually tried and the court finds on the record that the defendant was in fact prejudiced by the untimely filing and states the reasons for these findings, provided that when the allegation of a prior conviction is filed, the state must make available to the defendant a copy of any material or information obtained concerning the prior conviction. Before the trial on the charge of the previous conviction or the allegation that the defendant committed a felony while released on bond or on his own recognizance, the charge of previous conviction or the allegation that the defendant committed a felony while released on bond or on his own recognizance shall not be read to the jury. For the purposes of this subsection, "dangerous nature of the felony" means a felony involving the use or exhibition of a deadly weapon or dangerous instrument or the intentional or knowing infliction of serious physical injury upon another.

L. Intentional failure by the court to impose the mandatory sentences or probation conditions provided in this title shall be deemed to be malfeasance.

M. A person convicted of committing any felony offense, which felony offense is committed while the person is released on bail or on his own recognizance on a separate felony offense, shall be sentenced to a term of imprisonment two years longer than would otherwise be imposed for the felony offense committed while released on bond or on his own recognizance. The additional sentence imposed under this subsection is in addition to any enhanced punishment that may be applicable under any of the other subsections of this section.

N. A person who is at least eighteen years of age or who has been tried as an adult and who stands convicted of a serious offense except first degree murder or any dangerous crime against children, whether a completed or preparatory offense, and who has previously been convicted of two or more serious offenses not committed on the same occasion shall be sentenced to life imprisonment and is not eligible for suspension or commutation of sentence, probation, pardon, parole, work furlough or release from confine-

ment on any other basis except as specifically authorized by § 31–233, subsection A or B until the person has served not less than twenty-five years.

O. As used in this section, "serious offense" means any of the following offenses if committed in this state or any offense committed outside this state which if committed in this state would constitute one of the following offenses:

1. First degree murder.
2. Second degree murder.
3. Manslaughter.
4. Aggravated assault resulting in serious physical injury or committed by the use of a deadly weapon or dangerous instrument.
5. Sexual assault.
6. Any dangerous crime against children.
7. Arson of an occupied structure.
8. Armed robbery.
9. Burglary in the first degree.
10. Kidnapping.
11. Sexual conduct with a minor under fifteen years of age.
12. A drug related felony offense pursuant to § 13–3404.01, a violation of § 13–3405 involving an amount of marijuana having a weight at the time of seizure of eight pounds or more, a felony violation of § 13–3406 or any violation of §§ 13–3407 through 13–3409.

Added as § 13–704 by Laws 1977, Ch. 142, § 48, eff. Oct. 1, 1978. Renumbered as § 13–604 and amended by Laws 1978, Ch. 201, §§ 98, 101, eff. Oct. 1, 1978. Amended by Laws 1980, Ch. 229, § 7, eff. April 23, 1980; Laws 1981, Ch. 165, § 1; Laws 1982, Ch. 322, § 1; Laws 1984, Ch. 42, § 1; Laws 1984, Ch. 325, § 1; Laws 1985, Ch. 146, § 1; Laws 1985, Ch. 364, § 4, eff. May 16, 1985; Laws 1987, Ch. 307, § 3.

Historical Note

Source:
Pen.Code 1901, §§ 618, 630, 632.
Pen.Code 1913, §§ 726, 738, 739.
Rev.Code 1928, §§ 4898, 4899.
Code 1939, § 43–6112.
Laws 1951, Ch. 110, § 1.
Code 1939, Supp.1952, § 43–6111.
A.R.S. former §§ 13–1649, 13–1650.

The 1978 amendment, in subsec. A, inserted "of this section", substituted "§ 13–701" for "§ 13–901", and substituted "not less than one-half of the sentence imposed by the court" for "the minimum sentence" in the first sentence, in the second sentence substituted "subsection" for "paragraph", deleted "three-fourths of" following "presumptive term" and deleted an exception clause relating to class 6 felonies, and in the final sentence inserted "prescribed under this subsection" and substituted "13–702, subsection C, D and E" for "13–901.01"; in subsec. B, inserted "of this section", substituted "13–701" for "13–901", "subsection" for "paragraph", and "13–702, subsections C, D and E" for "13–702", and inserted "not less than two-thirds of"; in subsec. C, inserted "of this section", substituted "13–701" for "13–901", and inserted "not less than two-thirds of" in the first sentence, substituted "subsection" for "paragraph" and deleted "three-fourths of", and an exception clause to class 6 felonies in the second sentence, and in the final sentence inserted "prescribed under this subsection" and substituted "13–702, subsections C, D and E" for "13–901.01"; in subsec. D, inserted "of this section", substituted "13–701" for "13–901", and inserted "not less than two-thirds of" in the first sentence, in the second sentence substitut-

ed "subsection" for "paragraph", and in the final sentence inserted "prescribed under this subsection" and substituted "13–702, subsections C, D and E" for "13–901.01"; in subsec. E, inserted references to petty offenses and reduced convictions from two to one; inserted subsec. F, and redesignated subsequent subsections; in subsec. G, substituted "or knowing" for "knowing or reckless", "13–701" for "13–901" and inserted "not less than two-thirds of" throughout the first sentence, in the second sentence substituted "subsection" for "paragraph" and added exception, in the third sentence inserted "prescribed under this subsection" and substituted "13–702, subsections C, D and E" for "13–901.01", and added the final sentence; in subsec. H, deleted "or as part of a single continuing course of action" following "some occasion", inserted "at the discretion of the state", and added the second sentence; and in subsec. K, inserted "or the dangerous nature of the felony" in the first and second sentences, inserted "of a prior conviction" in the second sentence and added the final sentence.

The 1980 amendment substituted near the end of subsec. G "if committed after October 1, 1978, could be a dangerous felony under this section" for "carries a penalty of up to life imprisonment". Prior to amendment, subsec. G provided:

"Upon a first conviction of a class 2 or 3 felony involving use or exhibition of a deadly weapon or dangerous instrument or upon conviction of a class 2 or 3 felony when the intentional or knowing infliction of serious physical injury upon another has occurred, the defendant shall be sentenced to imprisonment for not less than the sentence and not more than three times the sentence authorized in § 13–701 for the offense for which the person currently stands convicted, and shall not be eligible for suspension or commutation of sentence, probation, pardon or parole or release on any other basis until not less than two-thirds of the sentence imposed by the court has been served. Upon a second conviction of a class 2 or 3 felony involving use or exhibition of a deadly weapon or dangerous instrument or upon a second conviction for a class 2 or 3 felony when the intentional or knowing infliction of serious physical injury upon another has occurred, the defendant shall be sentenced to imprisonment for twice the sentence and not more than four times the sentence authorized in § 13–701 for the offense for which the person currently stands convicted, and shall not be eligible for suspension or commutation of sentence, probation, pardon or parole or release on any other basis until not less than two-thirds of the sentence imposed by the court has been served. Upon a third or subsequent conviction for a class 2 or 3 felony involving use or exhibition of a deadly weapon or dangerous instrument or upon the third or subsequent conviction for a class 2 or 3 felony when the intentional or knowing infliction of serious physical injury upon another has occurred, the defendant shall be sentenced to imprisonment for three times the sentence and not more than five times the sentence authorized in § 13–701 for the offense for which the person currently stands convicted and shall not be eligible for suspension or commutation of sentence, probation, pardon or parole or release on any other basis until not less than two-thirds of the sentence imposed by the court has been served. Upon imposing a sentence pursuant to this subsection the court shall impose as a presumptive term three-fourths of the median of the allowable range, except in the case of a third or subsequent conviction in which case the presumptive term shall be the median of the allowable range. The presumptive term may be mitigated or aggravated within the range prescribed under this subsection pursuant to the terms of § 13–702, subsections C, D and E. For the purposes of this subsection in determining the applicability of the penalties provided herein for second or subsequent class 2 or 3 felonies, the conviction for any felony committed prior to October 1, 1978 which carries a penalty of up to life imprisonment may be designated by the state as a prior felony."

The 1981 amendment included provisions in subsec. K pertaining to allegations that defendant committed a felony while released on bond or his own recognizance, and added subsec. M.

The 1982 amendment substituted throughout the section "work furlough or release from confinement on any basis except as specifically authorized by § 31–233, subsection A or B" for "or release on any other basis".

Laws 1982, Ch. 322, § 10 provides:

"Notwithstanding the provisions of this act, the legislature intends that, if the provisions of title 41, chapter 20 [§ 41–2351 et seq.], Arizona Revised Statutes, operate to terminate the state department of corrections or the board of pardons and paroles, any provisions regarding powers, duties, functions or personnel added or amended by this act terminate on the date of termination of the agency affected."

Laws 1984, Ch. 42, § 1, substantially rewrote provisions for multiple subsequent offenses involving deadly or dangerous weapons in subsec. G.

Laws 1984, Ch. 325, § 1, inserted exception pertaining to subsec. N in subsecs. F and G, and added subsec. N.

Laws 1985, Ch. 146, § 1, in subsec. K modified the second sentence by substituting "shall" for "in its discretion may", and inserting "the date the case is actually tried unless the allegation is filed fewer than twenty days before the case is actually tried and the court finds on the record that the defendant was in fact prejudiced by the untimely filing and states the reasons for these findings".

Laws 1985, Ch. 364, § 4, inserted in subsecs. F and G references to § 13–604.01; inserted in subsec. N "or any dangerous crime against children" and substituted same for "Child molestation" as subsec. *O*, 6; and added subsec. *O*, 11.

The 1987 amendment added subsec. *O*, 12.

Former § 13–604 was transferred and renumbered as § 13–1004; see italicized note preceding § 13–601.

Reviser's Notes:

1984 Note. Prior to the 1985 amendments, this section contained the amendments made by Laws 1984, Ch. 42, § 1 and Ch. 325, § 1 which were blended together pursuant to authority of § 41–1304.03.

1985 Note. This section contains the amendments made by Laws 1985, Ch. 146, § 1 and Ch. 364, § 4 which were blended together as shown above pursuant to authority of § 41–1304.03.

SUPREME COURT OF ARIZONA

FILED
JUL 14 1992
NOEL K. DESSAINT
CLERK SUPREME COURT
BY

STATE OF ARIZONA, Appellee, vs. JOSEPH BARTLETT, JR., Appellant.	Supreme Court No. CR-88-0411-PR Court of Appeals No. 2 CA-CR 88-0024 Cochise County No. CR-87-00020 **O R D E R**

Appellee's "Motion to Recall and Stay Mandate" having been filed, and the Court having considered said motion,

IT IS ORDERED denying Appellee State of Arizona's motion to recall and stay mandate.

DATED this 14th day of July, 1992.

STANLEY G. FELDMAN
Chief Justice

TO:
Hon. Grant Woods, Attorney General
Attn: Paul J. McMurdie, Esq. and Linda L. Knowles, Esq.
James L. Conlogue, Esq.
Robert F. Arentz, Esq.
Stephen M. Dichter

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APPENDIX E